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No. 04-____

IN THE

Supreme Court of the United States

CATERPILLAR INC.,
Petitioner,

v.

STURMAN INDUSTRIES, INC., ODED E. STURMAN, AND CAROL K. STURMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment mandates the implied juror bias doctrine for exclusion of jurors in civil cases, and if so, whether the doctrine automatically disqualifies the spouse of an employee of a party. The Federal Circuit ordered a new trial on this basis, in conflict with the Eighth Circuit (which rejects the implied bias doctrine altogether), the Second, Fourth, Fifth, Sixth, Seventh and Eleventh Circuits (which have expressed doubts about the doctrine or limit its application), and the Ninth Circuit (which has affirmed a civil verdict reached by a jury containing two employees of a party).

2. Whether a party who has "specifically stated it would not individually challenge" a juror for cause, and who forgoes the opportunity to exercise a peremptory strike against that juror, may obtain reversal on appeal without establishing actual bias. On this question, the Federal Circuit construed this Court's opinion in *United States* v. *Martinez-Salazar*, 528 U.S. 304 (2000), in a way that conflicts with decisions of other courts of appeals.

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), petitioner states that all parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Petitioner states that it has no parent companies and no publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Caterpillar Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. *infra*, 1a-42a) is reported at 387 F.3d 1358. The district court's opinion (App., *infra*, 43a–56a) denying respondents' motion for a new trial is not reported.

JURISDICTION

The court of appeals issued its judgment on October 28, 2004 (App., *infra*, 59a-60a) and denied a timely petition for rehearing on January 7, 2005. *Id.* at 57a-58a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. AMEND. VII

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT

Contrary to decisions of this Court and in conflict with other courts of appeals, the Federal Circuit has greatly enlarged the arsenal a losing party may belatedly employ to sabotage a jury verdict. The decision below grants a new trial – on the controversial ground of implied juror bias – to a party who, as the Federal Circuit notes, "specifically stated it would not individually challenge" the juror, and who passed on the same juror when three peremptory challenges still remained. In similar circumstances, other circuit courts do not overturn verdicts. And no federal appellate court has vacated a judgment on the ground upon which the Federal Circuit relied – that the spouse of an employee of a party (who worked at a facility and on products totally unrelated to the case) is irrebutably presumed to be biased as a matter of constitutional law.

In short, the decision below weakens jury verdicts by making them extraordinarily fragile in ways that are incompatible with constitutional imperatives to preserve jury determinations. This departure from established constitutional standards on an issue of such far-reaching practical impact clearly justifies certiorari. The decision below also warrants this Court's review because it is an ideal

vehicle for resolving two related questions on which the courts of appeals are divided:

First, whether the doctrine of implied juror bias is constitutionally-mandated and has any continuing validity in light of this Court's strong criticism and, if so, whether the doctrine should be expanded to the unprecedented lengths charted by the Federal Circuit. The sharp division in the circuits stems, in large part, from the tension between the Court's opinion in *Smith* v. *Phillips*, 455 U.S. 209 (1982), which virtually sounds the death knell for claims of implied juror bias, and Justice O'Connor's concurring opinion in that case, which contemplates some limited vitality for the doctrine (not including the grounds on which the Federal Circuit relied). As the opinions in *Smith* v. *Phillips* have generated such a cacophony of conflicts in the circuits, this Court's review is strongly indicated.

Second, "whether normal principles of waiver . . . disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent." *United States* v. *Martinez-Salazar*, 528 U.S. 304, 318 (2000) (Scalia, J., concurring in the judgment). In conflict with the decision below, other courts of appeals roundly criticize the gamesmanship of counsel who forgo opportunities to challenge a juror and later seek to undermine the verdict because of that juror's service. On this point, the division of authority in the lower courts recapitulates the dissonance between the Court's opinion in *Martinez-Salazar* (on which the Federal Circuit relied), and Justice Scalia's concurring opinion (which foresaw just the sort of problem that is present in this case). On this related issue as well, resolution by this Court is needed to end the threat to hard-fought jury verdicts that this case presents.

1. The underlying dispute involves trade secret misappropriation, conversion and breach of contract claims between Caterpillar and the Sturmans regarding fuel injector devices. The case was filed in the United States District Court for the Central District of Illinois, in Peoria, where Caterpillar is headquartered. Respondents never moved for a change of venue.

Cognizant that "Caterpillar is a large citizen in this district, this community," the district court observed at the outset of jury voir dire that "I suspect there are lots of citizens who are impacted by Caterpillar's presence. It could be positive, it could be negative." App., *infra*, 87a. Commenting specifically on the well-known history of "conflicts between Caterpillar and its union," the court noted that "there may be union members who have feelings about Caterpillar that will prevent them from being fair and impartial." *Id.* at 87a-88a. Even before any further inquiry, the court discharged all four potential jurors who responded affirmatively to the question: "Is there any one here who simply because of Caterpillar's presence as a party, feels that they could not be fair and impartial to both sides, including Caterpillar, in this case?" *Id.* at 88a.

Of the remaining panel members, seventeen indicated that they (or family members) were currently or previously employed by Caterpillar. *Id.* at 97a-107a, 113a-119a, 120a-130a, 143a-148a, 152a-153a, 155a-165a. Respondents then made a blanket challenge to exclude only eleven of those jurors for cause, namely Caterpillar employees, retirees or their "closely related" family members. *Id.* at 175a-176a. Respondents did not identify the eleven individual panel members they were challenging. *Id.*

Although the district court stated it would "not grant this motion in total" (*id.* at 180a), it excluded the three

Caterpillar employees who knew potential witnesses in the case. *Id.* at 180a-181a. All other challenges for cause arising from Caterpillar employment would be decided on an individual basis. *Id.* at 181a. Respondents then challenged five individual jurors for cause (all based on employment or familial relationships with Caterpillar employees) and the district court granted three of those challenges. *Id.* at 181a-193a. At no time in this process did respondents mention any objection to Juror No. 3, Diana Adams-Trantham, a medical office bookkeeper. Indeed, as the court of appeals observed, respondents "specifically stated [they] would not individually challenge Juror No. 3...." App., *infra,* at 21a; *see also id.* at 46a-47a (district court finding same).

For peremptory challenges, the district court utilized a "no back-striking" procedure (App., *infra,* at 64a); once a party passed a prospective juror without exercising a peremptory challenge it could not return to strike a juror previously accepted. At their request, respondents were granted additional peremptory challenges so they had a total of five. *Id.* at 61a-64a. When the selection process reached Juror No. 3 (*id.* at 194a), respondents had exercised only two of their five challenges. *Id.* With three peremptories remaining, respondents passed Juror No. 3 without challenge.[1] *Id.* at 194a-195a.

2. Following a month-long trial, the jury reached a unanimous verdict favorable to Caterpillar. On post-trial motion, respondents raised their objections to Juror No. 3 for the first time. The district court rejected that contention as

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[1] Respondents subsequently used their remaining peremptory challenges to strike three jurors, none of whom worked for Caterpillar themselves or had a spouse who did so. *Id.* at 194a; *see id.* at 131a-133a, 143a-146a, 149a-150a (voir dire questioning of final three jurors peremptorily challenged by respondents).

waived because "the Sturmans were aware of Juror No. 3's marriage to a Caterpillar employee yet declined to individually challenge her for cause when offered the opportunity by the Court to do so. App., *infra*, at 47a.

3. On appeal pursuant to 28 U.S.C. § 1295(a)(1), the United States Court of Appeals for the Federal Circuit vacated the judgment and remanded for a new trial solely because of Juror No. 3's service. Although "Sturman specifically stated it would not individually challenge Juror No. 3, despite having additional grounds for doing so" (App., *infra*, at 21a), the panel held that respondents had not waived their objection to her: "we disagree with Caterpillar and the district court that Sturman had to individually challenge Juror No. 3 to later avoid waiving its objection." *Id.* at 20a.

On the merits of respondents' constitutional argument, the Federal Circuit held that the doctrine of implied bias "helps ensure the right to an impartial jury and a fair trial" and "applies equally" in civil and criminal cases. *Id.* at 23a-24a and n.2. In defining and applying the doctrine of implied bias in this case, the Federal Circuit noted it would apply "the law of the Seventh Circuit" and would "also look to opinions of the other regional circuits for their persuasive authority." *Id.* at 23a. The panel held that the district court "erred by not dismissing Juror No. 3 for cause" in response to defendants' original blanket challenge (*id.*) because, as a matter of law, a spouse's employment must always constitute at least a "tiny financial interest" in the case and result in automatic exclusion. *Id.* at 25a. Without finding any actual bias on the part of Juror No. 3 (an inquiry it acknowledged would be governed by a deferential standard of review), the panel applied a de novo standard to the issue of implied bias. *Id.* at 15a.

Having determined that Juror No. 3 was *per se* excludable, the Federal Circuit turned to the appropriate remedy. On this point, the court did not address whether respondents' Seventh Amendment or due process rights were prejudiced or impaired. Instead, the court held that vacatur of the jury verdict and remand for a new trial were required simply "[b]ecause Juror No. 3 actually sat on the jury." *Id.* at 27a. For this automatic new trial rule, the panel relied on this Court's opinion in *United States* v. *Martinez-Salazar*, which the panel interpreted as "ordering a new trial because a biased juror actually sat on the jury." *Id.*

REASONS FOR GRANTING THE PETITION

Contrary to prior decisions of this Court and in conflict with decisions of other courts of appeals, the Federal Circuit incorrectly resolved two related questions of paramount importance to the application of constitutional standards to jury verdicts. While other courts of appeals have correctly perceived this Court's aversion to *per se* categories of implied juror bias, the decision below expands the implied bias doctrine to overturn a verdict on the attenuated ground that one juror is the spouse of an employee of a party. The Federal Circuit could not point to a single federal appellate decision that ordered a new trial on that basis. In contrast, other circuits have rejected any reliance on the implied bias doctrine, or have carefully limited its application to much more direct and substantial instances of demonstrable bias. Indeed, prior cases have upheld verdicts even where employees of parties were themselves jury members. *Nathan* v. *Boeing*, 116 F.3d 422 (9th Cir. 1997). In short, . . . "the federal courts of appeals [are] split on the issue of implied bias." *Dyer* v. *Calderon*, 151 F.3d 970, 995 (9th Cir. 1998) (O'Scannlain, J., dissenting).

By itself, the Federal Circuit's unwarranted expansion of the implied bias doctrine fully justifies certiorari to resolve this conflict and to end any residual uncertainty in the lower courts over the Court's proscription of implied bias in *Smith* v. *Phillips*, 455 U.S. 209 (1982). The need for this Court's review is even more compelling in light of the Federal Circuit's reading of *Martinez-Salazar*. Indeed, the decision below exemplifies the very danger about which Justice Scalia's concurring opinion in *Martinez-Salazar* warned: allowing a party to object on appeal to "the seating of a juror he was entirely able to prevent." 528 U.S. at 318 (Scalia, J. concurring in judgment). In contrast to the Federal Circuit decision in this case, other courts of appeals have recognized that vacatur in such circumstances would constitute a threat to the sanctity and finality of jury verdicts. Contrary to the constitutional imperative to preserve such sanctity and finality, the Federal Circuit has provided a how-to manual for parties to sabotage trials by seating jurors they had multiple opportunities to exclude, and then seeking appellate relief to undo an adverse verdict.

Because of the importance and practical impact of these issues, which frequently arise and on which the lower federal and state appellate courts are sharply divided, this Court's review is fully warranted.

I. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SHARP SPLIT OF AUTHORITY ON THE IMPLIED JUROR BIAS DOCTRINE

A. This Court Has Long Been Averse to Claims of Implied Juror Bias

This Court has long been hostile to claims of implied bias as a basis for excluding jurors – or reversing jury

verdicts – in the absence of actual bias by an individual juror. Accordingly, in *United States* v. *Wood*, 299 U.S. 123 (1936), the Court rejected claims of implied bias and upheld a statute allowing federal employees to serve on juries in the District of Columbia when the government was a party to the suit. The essence of the Court's reasoning was that the common law did not preclude government workers from serving on juries even when their employer was a party. *Id.* at 138-41. *See Patton* v. *Yount*, 467 U.S. 1025, 1037 n.12 (1984).

The Court re-affirmed *Wood* in *Frazier* v. *United States*, 335 U.S. 497, 510-11 (1948) (no implied bias in criminal prosecution where all jurors were government employees), and in *Dennis* v. *United States*, 339 U.S. 162 (1950) (rejecting suspected Communist's contention that government employees were inherently biased against him because they had taken loyalty oaths to the federal government, the opposing party in the case). In particular, *Dennis* rejected the notion that theoretical "loss of employment" was a basis for finding implied bias. *See* 339 U.S. at 172 ("Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors. . . ."). These decisions are directly contrary to the Federal Circuit's conclusion that the Constitution requires the doctrine of implied juror bias and mandates application of that doctrine to vacate the verdict in this case.

In its most definitive consideration of the issue, in *Smith* v. *Phillips*, 455 U.S. 209 (1982), this Court strongly suggested that the implied bias doctrine is not viable for parties challenging jurors on a *per se* basis. The petitioner in *Smith* challenged his murder conviction after discovering that a juror had applied for a job with the prosecutor's office. *Id.* at 212. The district court found the implied bias doctrine

applicable and granted habeas relief. *See Phillips* v. *Smith*, 485 F. Supp. 1365, 1372-73 (S.D.N.Y.), *aff'd*, 632 F.2d 1019 (2d Cir. 1980). This Court reversed, noting that it "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215.

In a concurring opinion upon which some courts of appeals have relied, Justice O'Connor "express[ed] her view that the opinion does not foreclose the use of 'implied bias' in appropriate circumstances," *viz.*, a juror's employment with a party, a juror's being a "close relative" of a party, or a juror's being a "witness or somehow involved" in the underlying transaction. 455 U.S. at 221-22 (O'Connor, J., concurring).[2] Even those courts of appeals that rely on Justice O'Connor's concurring opinion have not expanded the implied bias doctrine to reverse a verdict on the basis stated by the Federal Circuit in this case.

B. Lower Courts are Irreconcilably in Conflict as to both the Viability and the Application of the Implied Bias Doctrine

Today, substantial uncertainty surrounds the implied juror bias doctrine among lower courts. Simply put, "the federal courts of appeals [are] split on the issue of implied bias." *Dyer*, 151 F.3d at 995 (O'Scannlain, J., dissenting). Courts are divided both as to (a) whether the implied bias doctrine is viable at all; and (b) if it is viable, when it applies.

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2 For example, the Federal Circuit (App., *infra*, at 15a) cited *Hurley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992), which in turn quoted Justice O'Connor's concurring opinion in *Smith v. Phillips*.

1. Courts are Split as to Whether the Implied Bias Doctrine is Viable and Compelled by the Constitution

The Eighth Circuit has definitively rejected the implied bias doctrine altogether, and requires the party challenging a juror to demonstrate actual bias. *See Rogers* v. *Rulo*, 712 F.2d 363, 367 (8th Cir. 1983) ("This court previously has rejected a *per se* theory of implied bias and has required that actual prejudice be shown"); *United States* v. *Kelton*, 518 F.2d 531, 533 (8th Cir. 1975) (same). Many federal and state courts have likewise rejected "implied bias" and—consistent with *Smith* and *Dennis*—have required a showing of "actual bias" when a party alleges jury partiality.[3]

Other circuits "have expressed doubts about the [implied bias] doctrine entirely." *Salvato* v. *Illinois Dep't of Human Rights,* 155 F.3d 922, 927 (7th Cir. 1998). The Eleventh Circuit, for example, "consider[s] such a *per se* rule [of juror disqualification] to be at odds with the United States

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[3] *See, e.g., Carr* v. *Robinson*, 1999 U.S. Dist. LEXIS 10164, at *18 (E.D. Mich. June 16, 1999) ("to maintain a claim of prejudice from trial counsel's failure to strike an allegedly biased juror, a defendant must show that the juror was actually biased against the defendant; implied bias is not sufficient"); *United States* v. *Berrios-Rodriguez*, 768 F. Supp. 941, 943 (D.P.R. 1991) ("Where jury partiality is alleged, there is not a presumption of prejudice; rather the defendant has the burden of proving actual prejudice") (citing *Smith*); *State* v. *Johnson*, 2003 Ohio App. LEXIS 1748, at *15 (Ohio Ct. App. Apr. 10, 2003) (Kilbane, J., concurring) ("A hearing is required to show actual prejudice because juror bias will not be implied") (citing *Smith*), *appeal denied*, 802 N.E.2d 154 (Ohio 2004); *Cassady* v. *Souris River Tel. Coop.*, 520 N.W.2d 803, 806 (N.D. 1994) ("To disqualify a prospective juror, a challenger must establish an actual bias, rather than a presumed bias, on the part of the prospective juror"); *People* v. *Gladstone*, 517 N.Y.S.2d 294, 295 (App. Div. 1987) ("an assertion of implied bias is not sufficient to disqualify jurors") (citing *Dennis*).

Supreme Court's instructions on how to evaluate the qualifications of individuals for jury service." *Depree* v. *Thomas*, 946 F.2d 784, 788 (11th Cir. 1991); *Williams* v. *Griswald*, 743 F.2d 1533, 1538 n.7 (11th Cir. 1984) (*Smith* "declined to use the urged 'implied bias' test"). The Fourth and Sixth Circuits have expressed similar doubts. *Fitzgerald* v. *Greene*, 150 F.3d 357, 365 (4th Cir. 1998) (questioning viability of implied bias doctrine) (citing *Person* v. *Miller*, 854 F.2d 656, 664 (4th Cir. 1988)); *United States* v. *Howard*, 752 F.2d 220, 223-24 (6th Cir. 1985) (discussing but declining to decide whether *Smith* overruled doctrine of implied bias).[4]

The creation and definition of *per se* categories of juror exclusion are more appropriately legislative functions. To that end, Congress has established certain *per se* exclusions to jury service by statute (*see* 28 U.S.C. §§ 1863(b)(6), 1865(b)(1)-(5)) as an effort to craft uniform standards of competency for federal jurors. *See Abbott* v. *Mines*, 411 F.2d 353, 354-55 (6th Cir. 1969). Implied bias is not one of the excluded categories—let alone family relation to an employee of a party. *Cf. Francone v. S. Pac. Co.*, 145 F.2d 732, 733 (5th Cir. 1944) (relying on Texas statute disqualifying party's employees from jury service); *Otis Elevator Co.* v. *Reid*, 706 P.2d 1378, 1383 n.4 (Nev. 1985)

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[4] Commentators have also opined that this Court's decisions have foreclosed the "implied bias" test. *See, e.g.*, Note, *The Right to an Impartial Trial is Protected by an Opportunity to Prove that Juror Bias or Prosecutorial Misconduct Affected the Case*, 26 HOW. L.J. 799, 812 (1983) (*Smith* rejected "implied bias" test); Sharon R. Gromer, *Sixth Amendment -- The Demise of the Doctrine of Implied Juror Bias: Smith v. Phillips*, 102 S. Ct. 940 (1982), 73 J. CRIM. L. & CRIMINOLOGY 1507 (1982) (essentially same); Comment, 49 MICH. L. REV. 130, 132 (1950) (*Dennis* "raises some question as to whether implied bias can ever be shown no matter what the circumstances").

(any *per se* implied bias exclusions from jury service should be promulgated by legislature, rather than courts).[5]

2. The Circuit Courts are Split as to When the Implied Bias Doctrine is Applicable

Even among the courts of appeals that recognize implied bias in some circumstances, courts have reached disparate and inconsistent results. *See Solis v. Cockrell,* 342 F.3d 392, 399 n.42 (5th Cir. 2003) (listing several "implied bias" cases and noting that "[f]ar more numerous are those cases in which courts have refused to apply the doctrine"), *cert. denied*, 540 U.S. 1151 (2004). No court has swung the pendulum to the extreme reached by the Federal Circuit in this case: vacating a verdict because a spouse of an employee of a party served on the jury.

Employment and Business Relationships. This Court has held, of course, (*see supra* at 8-9), that government employment is not sufficient to impute bias to a juror in a government case. *See Dennis,* 339 U.S. at 172; *Wood*, 299 U.S. at 138-41. With respect to the private sector, circuit courts are split as to the service of jurors who are themselves employed by a party.

The Ninth Circuit holds that employment with a party does not *per se* exclude a juror, and that actual bias must be shown. *See Nathan* v. *Boeing Co.,* 116 F.3d 422, 425 (9th Cir. 1997) ("Since we do not have a per se rule against employees serving as jurors in a case involving their employer, we hold that the district court did not abuse its

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5 *See, e.g., Jackson* v. *Bd. of Mayor & Aldermen*, 111 So. 828 (Miss. 1927) (common law prohibitions of jury service did not extend to employees' relatives).

discretion in permitting the two Boeing employees to remain on the panel"). As discussed *supra* (at 11), the Eighth Circuit does not recognize *per se* disqualification based upon employment (or any other factor). *See, e.g., Jamestown Farmers Elevator, Inc.* v. *General Mills, Inc.*, 413 F. Supp. 764, 775 (D.N.D. 1976) (holding that juror who owns stock or works for defendant company is not automatically disqualified), *aff'd in part, rev'd in part on other grounds,* 552 F.2d 1285 (8th Cir. 1977).[6]

Still other courts hold that "a commercial relationship between a juror's employer and a party -- does not constitute a sufficient basis for a challenge for cause where the juror expressly affirms her ability to sit fairly." *Bainlardi* v. *SBC Warburg*, 1998 U.S. Dist. LEXIS 19512, at *9 (S.D.N.Y. Dec. 11, 1998) (employee of defendant's "major customer" empanelled). Courts uphold service by jurors who have a variety of significant business relationships with parties. *See, e.g., Image Tech. Servs., Inc.* v. *Eastman Kodak Co.*, 125 F.3d 1195, 1220 (9th Cir. 1997) (upholding refusal to excuse

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[6] Among state courts, *see, e.g., Seals* v. *Pittman,* 499 So. 2d 114, 119 (La. Ct. App. 1986) ("the mere fact that a juror is employed by a defendant, without further showing, is not sufficient to exclude a juror for cause"); *Basin Elec. Power Coop.* v. *Miller,* 310 N.W.2d 715, 718-19 (N.D. 1981) (rejecting *per se* rule against employee-jurors); *Sansouver v. Glenlyon Dye Works,* 68 A. 545, 546 (R.I. 1908) (refusing to excuse juror who was employee of defendant's majority stockholder); *Tucker* v. *Buffalo Cotton Mills,* 57 S.E. 626, 627 (S.C. 1907) (employees of defendant not *per se* disqualified from serving on jury); *Dimmack* v. *Wheeling Traction Co.,* 52 S.E. 101 (W. Va. 1905) (same as *Sansouver*); *Purple* v. *Horton,* 13 Wend. 9, 22-23 (N.Y. 1834) (criticizing rule prohibiting juror from same "society or corporation" as party). Legal encyclopedias likewise recognize support for the principle. *See, e.g.,* 50A C.J.S. *Juries* § 384, at 416 (1997) (noting that while contrary authority exists, "it has also been held that a juror is not automatically [disqualified] merely because the juror is an employee of a party, of a party's insurer, or of the victim").

juror who had previously done business with defendant; juror characterized relationship as "sometimes adversarial"); *Vasey* v. *Martin-Marietta Corp.*, 29 F.3d 1460, 1466-68 (10th Cir. 1994) (employee of consultant for defendant may serve on jury); *Dunagan* v. *Appalachian Power Co.*, 23 F.2d 395, 397 (4th Cir. 1928) (jurors who supplied goods to defendant corporation not disqualified); *Ramirez* v. *IBP, Inc.*, 938 F. Supp. 735, 736 (D. Kan. 1996) (employee of company that did business with defendant may serve on jury), *aff'd mem.*, 131 F.3d 152 (10th Cir. 1997).

In contrast, several circuits have held (or issued dicta suggesting) that employment with a party constitutes grounds for applying the implied bias doctrine on a *per se* basis. *See, e.g., Francone,* 145 F.2d at 733 (employees incompetent to serve as jurors);[7] *accord Getter* v. *Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995) (dicta indicating same where juror was both a shareholder and spouse of a party's employee). This group of cases cannot be reconciled with the many cases cited above (*see*, *supra,* at 13-14) holding that employment or a business relationship with a party is not grounds for automatic juror disqualification for implied bias.

Family Relationships. In addition to the Eighth Circuit's refusal to recognize any *per se* category of implied bias, several circuits likewise refuse to include familial relationships in the *per se* bias category. *See, e.g., Cox* v. *Treadway*, 75 F.3d 230, 239 (6th Cir. 1996) (refusing to adopt "per se requirement that any juror with a family

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[7] *Francone* cited *Crawford v. United States,* 212 U.S. 183 (1909), as support for its conclusion that employees were *per se* biased. *See* 145 F.2d at 733 & n.2. But, this Court definitively repudiated *Crawford* in *Woods*. *Francone* also relied on a Texas statute that disqualified a party's employees from jury service *See id.* at 733 & n.4; VERNON'S ANN. TEX. CIV. STAT. ART. 2134. No such legislative mandate applies in this case.

relationship with law enforcement must be disqualified"); *United States* v. *Beasley*, 48 F.3d 262, 267 n.4 (7th Cir. 1995) (same); *United States* v. *Brown*, 644 F.2d 101, 105 (2d Cir. 1981) ("we do not wish to institute a series of presumptions of implied bias in other employment or familial relationships which might affect a juror's impartiality. To do so would burden the courts needlessly with a responsibility of endless speculation on the presumptive bias of potential jurors");[8] *United States* v. *Jones*, 608 F.2d 1004, 1008 (4th Cir. 1979) ("We decline to establish a *per se* rule of disqualification where a juror is related to a victim of a similar crime"); *United States* v. *Caldwell*, 543 F.2d 1333, 1347 (D.C. Cir. 1974) (refusing to categorically exclude relatives of police officers from jury in a criminal trial for murdering a police officer); *see also Seyler* v. *Burlington N. Santa Fe Corp.*, 121 F. Supp. 2d 1352, 1362-63 (D. Kan. 2000) (empanelling juror whose husband retired from defendant' employ after thirty years, and whose son worked for defendant).[9]

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[8] Although the court below cited *United States* v. *Haynes*, 398 F.2d 980 (2d Cir. 1968), to support its decision that Juror No. 3 was biased as a matter of law (*see* App., *infra*, at 24a), the Second Circuit rejects the *per se* bias test in familial relationships. *See Brown*, 644 F.2d at 105.

[9] Among state courts, *see, e.g.*, *Metzger* v. *Al-Ataie*, 2003 Ohio App. LEXIS 2502, at *7 (Ohio Ct. App. May 28, 2003) (allowing juror whose daughter worked for defendant clinic); *Garnick* v. *Teton County Sch. Dist. No. 1*, 39 P.3d 1034, 1043 (Wyo. 2002) (allowing juror whose son was an assistant for teacher at defendant school); *Scott* v. *Am. Tobacco Co.*, 795 So. 2d 1176, 1186 (La. 2001) (rejecting *per se* disqualification of jurors whose family members are potential beneficiaries of class action); *Lambie* v. *Schneider*, 713 N.E.2d 603, 610 (Ill. App. Ct. 1999) (empanelling juror whose father-in-law had a heart condition and was continuing patient of defendant surgeon in malpractice suit); *Savant* v. *Lincoln Eng'g*, 899 S.W.2d 120, 122-32 (Mo. Ct. App. 1995) (refusing to strike juror even though her daughter worked for insurance company covering defendant); *Estate of Hannis* v. *Ashland State Gen. Hosp.*, 554 A.2d 574, 578-79 (Pa. Commw. Ct. 1989) (empanelling juror whose child

Other Contexts in which Circuit Courts are in Conflict on the Implied Bias Doctrine. The persistence and frequency of implied juror bias issues in additional contexts – on which the circuits are similarly split – amply demonstrates the need for, and potential benefit of, this Court's review.

For example, the Fifth and Sixth Circuits have held that *Smith v. Phillips* eliminated the *per se* implied bias

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was to receive continuous treatment from defendant doctor in malpractice action); *Quincy* v. *Joint Sch. Dist.*, 640 P.2d 304, 307-308 (Idaho 1981) (upholding denial of challenge to juror whose wife was a bus driver for defendant school district in case involving collision with plaintiff by another bus driver); *Farmers Union Grain Terminal Ass'n* v. *Nelson*, 223 N.W.2d 494, 500 (N.D. 1974) (spouses of persons doing business with a cooperative are not automatically disqualified as jurors in a case involving the cooperative); *Matthews* v. *Jean's Pastry Shop, Inc.*, 311 A.2d 127, 130 (N.H. 1973) ("the relationship of another juror to an employee of the defendant [is not grounds] for absolute disqualification"); *In re Estate of O'Neill*, 190 S.E.2d 754, 759 (S.C. 1972) (persons related to employees of hospital in will contest in which hospital was potential beneficiary and party to action were not disqualified from jury); *Wilson* v. *Atl. C. L. R.R.*, 156 S.E.2d 463, 463-64 (Ga. Ct. App. 1967) ("'Relationship to an employee of a corporation does not in this State render a juror incompetent, as a matter of law, to serve on the trial of a case in which the corporation is a party'") (citation omitted); *Good* v. *Farmers Mut. Ins. Co.*, 62 N.W.2d 425, 426-27 (Wis. 1954) (wife of policyholder of defendant was not incompetent to serve on jury); *Jackson* v. *Bd. of Mayor & Aldermen*, 111 So. 828 (Miss. 1927) (any common law prohibitions of jury service did not not extend to employees' relatives); *Stewart's Adm'x* v. *Louisville & N. R.R.*, 125 S.W. 154, 157 (Ky. 1910) ("The fact that one of the jurors was related by marriage to one of the defendant's counsel, that another had a brother in the service of the defendant, and another two nephews, was no ground for setting aside the verdict"); *Hern* v. *S. Pac. Co.*, 81 P. 902, 908 (Utah 1905) (juror married to niece of defendant's employee not disqualified). Again, legal encyclopedias likewise recognize the principle. *See* 47 AM. JUR. 2D *Jury* § 307, at 961 (2d ed. 1995) ("relationship to an employee of a party litigant does not disqualify one to serve as a juror in an action by or against the employer").

presumption with respect to unauthorized communications with jurors. *Abell* v. *Potomac Ins. Co.*, 858 F.2d 1104, 1146 (5th Cir. 1988) (*Smith* standard "no longer assumes jury prejudice"), *vacated on other grounds sub nom. Fryar* v. *Abell*, 492 U.S. 914 (1989); *United States* v. *Pennell*, 737 F.2d 521, 532-34 (6th Cir. 1984) (same); *United States* v. *DeLutis*, 722 F.2d 902, 909 (1st Cir. 1983) (same). But, other circuits hold that the implied bias presumption remains viable in those circumstances. *Stockton* v. *Virginia*, 852 F.2d 740, 744 (4th Cir. 1988); *United States* v. *Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir.1985). *See, e.g., Atwood* v. *Mapes*, 325 F. Supp. 2d 950, 968-69 (N.D. Iowa 2004) (discussing split of authority).

C. The Decision Below Imposes Unwarranted Constitutional Burdens on the Jury System that this Court Should Correct

In *McDonough Power Equipment v. Greenwood*, this Court observed: "[i]t seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload." 464 U.S. 548, 553 (1984). Consistent with that observation, this Court has never interpreted the Constitution to require each juror's mind to be a *tabula rasa*. Rather, the key inquiry as to impartiality is whether jurors are capable of rendering a fair and objective verdict based upon the evidence presented. *See, e.g., Patton*, 467 U.S. at 1035-36 (in assessing a charge of bias, the question was simply "did [the] juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed"); *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961) ("mere existence of any preconceived notion" relevant to the accused's guilt or innocence is not sufficient to negate impartiality); *see also Darbin* v. *Nourse*, 664 F.2d 1109, 1116 (9th Cir. 1981) (Kennedy, J., concurring) ("Even

jurors with preconceived notions about the outcome of the case can sit if they can render a fair and objective judgment based on the evidence"). Under settled principles, Juror No. 3's answers to voir dire questions fully confirmed her impartiality and fitness to serve. App., *infra,* at 126a-128a, 173a.

By crafting a category of automatic exclusion for implied bias based on an amalgam of increasingly remote inferences, the decision below mandates a new trial due to the service of a juror who is neither the employee of a party nor the spouse of a party. She is the spouse of an employee who works in a plant that is not involved in the case and who deals with products that are also not involved in the case.[10] Relying on dicta in *United States v. Polichemi,* 219 F.3d 698, 704 (7th Cir. 2000) the Federal Circuit held this relationship satisfied the standard of "even a tiny financial interest in the case." App., *infra,* at 25a. Such an attenuated inference of partiality presumed as a matter of law poses obvious and substantial problems for the fair and efficient operation of the jury system. *First*, by creating a *per se* category, the Federal Circuit precludes the appropriate inquiry into whether a juror actually has a financial interest – even a tiny one – in the outcome of the case. *Second*, the *per se* category precludes the district court from crafting inquiries and procedures that fit the circumstances and locale of trial.[11]

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10 *See* App., *infra,* at 173a. Juror No. 3's husband is an assembler at a plant in Mapleton, Illinois, a foundry facility where molten iron is poured to make engine blocks. The Mapleton plant is located approximately 80 miles from Caterpillar's fuel injection operations in Pontiac.

11 "It is also well recognized that with the small population of some counties it would be difficult to pick jurors who bear no relationship to some party in litigation." *Balavich* v. *Yarnish*, 97 A.2d 540, 542 (Me. 1953).

This case is an apt example. Peoria is a relatively small city in which Caterpillar is by far the largest employer with – as noted during voir dire – a well-known, sometimes contentious, history of labor-management relations. App., *infra*, at 63a, 70a, 87a-88a. There is, accordingly, no basis for a presumption that all employees (or their spouses) would necessarily harbor a disqualifying partiality for Caterpillar. The district court was alert to this reality. "It could be positive, it could be negative. I don't know." *Id.* at 87a. Accordingly, the court utilized procedures for individual inquiry on challenges for cause. By vacating the judgment, the Federal Circuit incorrectly eliminated all discretion to do so. Yet, it will generally be the case that a trial judge residing in the area is far better suited to detect, assess and cure any bias in the jury panel through such individual inquiry procedures. Such individual inquiries have the additional advantage of creating a full record for appellate review.[12]

Third, the Federal Circuit's rule of automatic exclusion does not even meet the needs of the very standard it is ostensibly designed to promote: "a financial interest in the case." App., *infra*, at 25a. Many family, personal and community relationships could create a greater financial interest than that of the spouse of an employee in a distant facility not involved in the case. Under the Federal Circuit's

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[12] The Texas Supreme Court recently explained the rationale for encouraging full inquiry of individual prospective jurors: "If a venire member expresses what appears to be bias, we see no reason to categorically prohibit further questioning that might show just the opposite or at least clarify the statement. If the initial apparent bias is genuine, further questioning should only reinforce that perception; if it is not, further questioning may present an impartial venire member from being disqualified by mistake." *Cortez ex rel. Estate of Puente* v. *HCCI-San Antonio, Inc.*, 2005 Tex. LEXIS 206, at *11 (Tex. Mar. 11, 2005) (citation omitted).

"tiny financial interest" standard, no actual financial interest need be proved. Anyone who owned shares in a mutual fund that holds Caterpillar stock would be subject to exclusion under this standard. Nothing in the Constitution compels or countenences that result. And, in the modern economy, this standard is flatly antithetical to the operation of the jury system. For example, the spouse of an employee making Hanes underwear (headquartered in North Carolina) would be excluded from jury service in a case against Jimmy Dean sausages (headquartered in Cincinnati), or Kiwi shoe polish, or Coach handbags, all of which are (or were) owned by Sara Lee Corporation. The spouse of an employee making Life Savers candy would be excluded from jury service in a case against Phillip Morris cigarettes, once under common corporate ownership. And, should any such person serve on a jury, the verdict would be vulnerable to attack and reversal on appeal. The dangerous fragility the decision below imposes on jury verdicts provides compelling justification for this Court's review.

II. THIS COURT SHOULD REVIEW THE FEDERAL CIRCUIT'S APPLICATION OF *MARTINEZ-SALAZAR* IN ORDER TO PREVENT ABUSE AND GAMESMANSHIP IN THE EXERCISE OF PEREMPTORY CHALLENGES

This case presents a second, related question on which the lower courts are also divided. The question involves the interpretation and application of dicta in this Court's opinion in *United States v. Martinez-Salazar*, 528 U.S. 304 (2000), which held that a criminal defendant's exercise of peremptory challenges is neither impaired nor denied when he chooses peremptorily to remove a juror who should have been excused for cause. That decision has

resulted in considerable discord as the lower courts struggle to contend with dicta in the majority opinion suggesting that parties can undo verdicts through the stratagem of not peremptorily striking jurors they had previously challenged for cause. The possibility that a losing party may obtain reversal on appeal because of a juror who could have been excluded, has undermined the security of verdicts and aroused great judicial concern.

The decision below invites precisely the sort of gamesmanship and abuse about which Justice Scalia warned in his concurring opinion in *Martinez-Salazar*. *See* 528 U.S. at 318-19 (Scalia, J. concurring in judgment). Justice Scalia foresaw that a litigant could allow the disqualified juror to be seated, and then complain to the appellate court in the event of an adverse ruling. *Id.*

Other courts have echoed Justice Scalia's concerns that a party can keep an "ace in the hole" by not exercising peremptory challenges on an allegedly biased juror, and then appeal on the ground that the juror should have been stricken for cause. As Judge Posner opined:

> Since the use of a peremptory challenge to remove that juror would cure the judge's error, the defendant's failure to use a peremptory challenge to do this might well be thought to make the error a self-inflicted wound, as argued in a concurring opinion in *Martinez-Salazar*, 528 U.S. at 318-19. The majority opinion, however, suggests a different view—that the litigant can let the biased juror be seated and seek to reverse the adverse judgment (if one results) on appeal on grounds of bias. *See id.* at 314-17. The suggestion is dictum, and can be questioned as putting the litigant in a heads-I-win-tails-you-lose position: if he wins a

> jury verdict, he can pocket his victory, and if he loses, he can get a new trial.

Thompson v. Altheimer & Gray, 248 F.3d 621, 623 (7th Cir. 2001); *accord Merritt v. Evansville-Vanderburgh Sch. Corp.*, 765 N.E.2d 1232, 1235-38 (Ind. 2002) (party waived any implied bias challenge by not exercising peremptory strike on allegedly biased juror).[13] Similarly:

> There is no good reason to allow a party to hold an ace for reversal in the event of an unfavorable [verdict] by allowing the trial to proceed without removing a legally unqualified juror as could have been done. A party cannot excuse jurors who are otherwise qualified and keep a juror who is not qualified and thereby obtain reversal for [a] denial of a challenge for cause.

Merritt v. *Evansville-Vanderburgh Sch. Corp.*, 735 N.E.2d 269, 273 (Ind. Ct. App. 2000) (Sharpnack, C.J., dissenting), *rev'd*, 765 N.E.2d 1232 (Ind. 2002).

Such gamesmanship is precisely what occurred below. In response to voir dire questions, Juror No. 3 indicated there was nothing that would prevent her from being fair and impartial; and, further, that she could give both sides a fair trial. App. *infra*, at 128a. In reply to an inquiry by respondents, Juror No. 3 confirmed that her husband's employment had nothing to do with the Caterpillar plant or

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[13] *See also* William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1404 (Fall 2001) (noting that under *Martinez-Salazar* there is nothing to prevent, a criminal defense attorney from reasoning "'I'll think I'll keep that Klansman on the jury, who said in open court that he could not be fair to my black defendant, because I want to keep my peremptory challenges available so I can strike all Tauruses, who are well-known to be pro-prosecution'").

products involved in the case. *Id.* at 173a. Respondent's counsel said, "Great." *Id.* Subsequently, as the Federal Circuit recounted, "Sturman specifically stated it would not individually challenge Juror No. 3." *Id.* at 21a. When the time came for peremptory challenges, respondents chose to forgo the opportunity to strike Juror No. 3, although they had three challenges remaining when she was reached. *Id.* at 194a-195a. Having chosen to acquiesce in Juror No. 3's service and to bypass multiple opportunities to pursue an individual challenge for cause and an available peremptory strike, respondents opted instead to gamble on the verdict. In rewarding that tactic, the decision below exposes the serious damage to the jury system that would result if *Martinez-Salazar* is taken to such untenable lengths. "The judicial system is no place for the sport of obstruent gamesmanship." *United States* v. *Lovelace*, 683 F.2d 248, 250-51 (7th Cir. 1982).[14]

Moreover, the practical effect of respondents' tactics was to deny Caterpillar and the lower courts all opportunity to assess any presumption of bias with respect to Juror No. 3. Had respondents complied with the district court's preference for individual assessment of challenges for cause, then the record could have reflected whether there was, in fact, any

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[14] *See, e.g., Lange* v. *Schultz*, 627 F.2d 122, 126 (8th Cir. 1980) ("If Lange was concerned about the bias or prejudice of particular members of the jury, then he should have challenged these jurors for cause during voir dire); *Zamora* v. *Guam*, 394 F.2d 815, 816 (9th Cir. 1968) (defendant waived implied bias challenges by failing to follow the judge's preference for individual analysis); *United States* v. *Eldridge*, 569 F.2d 319, 320 (5th Cir. 1978) (defendant failed to create adequate record for appellate court to review claims of bias); *Moore* v. *Harris*, 469 F. Supp. 945, 952-53 (S.D.N.Y.) (defense counsel's "casual" inquiry as to juror's potential bias indicated that counsel "did not perceive the presence of [juror] on the jury as a significant threat"), *aff'd mem.*, 614 F.2d 1289 (2d Cir. 1979).

basis for excluding Juror No. 3 through the process *Smith* v. *Phillips* prescribes. In that event, respondents would have had the burden of establishing any disqualifying partiality. *Wainwright* v. *Witt*, 469 U.S. 412, 423 (1985); *Irvin*, 366 U.S. at 723. Instead, respondents bypassed the need to meet their burden and effectively sabotaged a month-long trial by keeping Juror No. 3 off the court's radar screen until after the verdict was returned. In the absence of the individual inquiry that the district court requested – and respondents chose to forgo – there is no basis for indulging a constitutionally-based presumption of implied bias and *per se* disqualification from jury duty. *See United States* v. *Rhodes*, 177 F.3d 963, 965-66 (11th Cir. 1999) (although juror's familial relationship with witness made her potentially biased, additional questioning determined that juror could fairly decide issues in case). In conflict with the decision below, the Ninth Circuit holds that a defendant waives his challenge to jurors by failing to follow the judge's preference for individual, rather than blanket *per se* analysis. *Zamora*, 394 F.2d at 816.

At the end of the day, the Federal Circuit's expansion of *Martinez-Salazar* – and parsimonious application of normal waiver standards – embraces several practical and enormously important questions that require this Court's resolution.[15] *First*, whether *Martinez-Salazar* should apply in civil cases. *Second*, whether a party's failure to utilize a peremptory strike always preserves a challenge for cause on the ground of implied bias – even when the party has expressly announced a decision not to challenge an individual juror. *Third*, whether a party can avoid meeting its burden of proving actual bias through respondents'

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15 The decision below flatly misreads *Martinez-Salazar* as "ordering a new trial because a biased juror actually sat on the jury." App., *infra*, at 27a. This Court unanimously *reversed* the grant of a new trial.

stratagem that shifts the inquiry to "implied" bias, a question of law on which no deference is given to the trial court's assessment. *Fourth*, whether the result must automatically be vacatur of the judgment and remand for a new trial. A more discerning approach – and one more in keeping with constitutional jurisprudence – would require an additional step: determining whether the complaining party has, in fact, suffered a deprivation of Seventh Amendment or due process rights.

Under the decision below, hard-fought jury verdicts are vulnerable to the whim and gamesmanship of trial strategies. Prudent appellate courts have been careful to remind counsel of their obligation to "use peremptory challenges to protect their clients against potentially biased jurors, rather than gambling everything on their ability to show bias after-the-fact and to obtain a reversal . . . on this basis." *Polichemi,* 219 F.3d at 704. Because the Federal Circuit departed from that sound principle, this Court should grant review to reverse the decision below and avert the mischief it condones and will surely spawn.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 6, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 03-1444,-1490

CATERPILLAR INC.

Plaintiff-Cross Appellant,

v.

STURMAN INDUSTRIES, INC.
ODED E. STURMAN, AND CAROL K. STURMAN,

Defendants-Appellant.,

On Appeal from the United States District Court,
For the Central District of Illinois
(D.C. Civ. No. 99-1201)
Chief Judge: Honorable Joe Billy McDade

Before: NEWMAN, DYK, and PROST, Circuit Judges.

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of Chicago, Illinois

With him on the brief were Paul R. Steadman, Mary E. Zaug, Craig D. Leavell, Mark L. Vanboncouer and Tiffany P. Cunningham

Counsel for Defendants-Appellants.

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With him on the brief were Robert G. Abrams, Gregory J. Commins, Jr., Christopher J. DelliCarpini and Gary J. Fischman. Of counsel was Pamela S. Kane

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DECIDED: October 28, 2004

PROST, Circuit Judge.

Sturman Industries, Inc., Oded E. Sturman, and Carol K. Sturman (collectively, Sturman) appeal from a decision of the United States District Court for the Central District of Illinois, Case No. 99-CV-1201, in which the jury found in favor of Caterpillar Inc. (Caterpillar) on its claims of trade-secret misappropriation, breach of contract, and conversion. In particular, Sturman appeals the district court's refusal to strike a juror for cause, the denial of judgment as a matter of law, the exclusion of a defense exhibit from evidence before the jury, the assignment of two of its United States patents to

Caterpillar, and the grant of summary judgment in favor of Caterpillar on certain of Sturman's counterclaims. Caterpillar cross-appeals the trial judge's findings in favor of Sturman on issues of co-inventorship of various United States patents, as well as the limitation on state unjust enrichment remedies as preempted by federal law. We reverse the district court's decision to allow a presumed biased juror to sit on the jury, vacate the jury's verdict and resultant remedies, and remand for a new trial on the state common law and statutory claims. In addition, we reverse the grant of summary judgment in favor of Caterpillar on Sturman's fraudulent inducement counterclaim, affirm the decision maintaining Mr. Sturman as the sole inventor of U.S. Patent Nos. 5,460,329 and 5,640,987, and reverse the decision naming Mr. Sturman the sole inventor of U.S. Patent No. 5,479,901.

I. BACKGROUND

A. Facts

As the district court noted, "[t]he technology at issue in this case is the use of magnetic latching in a fuel injector via the use of residual magnetism." Residual magnetism here refers to magnetism that a material continues to exert after it has been magnetized by the process of passing an electric current through a coil of wire wound around the material.

Mr. Sturman began his work in residual magnetism in the nineteen-sixties. On July 3, 1973, Mr. Sturman obtained U.S. Patent No. 3,643,898 (the '898 patent) on technology employing this phenomenon. The '898 patent relates to "[l]atching devices which utilize the residual magnetism retained in the relatively soft magnetic materials in the magnetic circuit for the latching force." '898 patent, Abstract. Figure 8 of the '898 patent (below) demonstrates relevant features of the claimed invention.

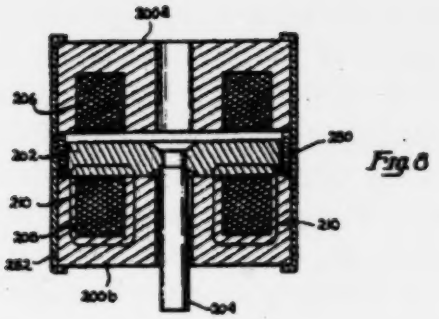


Fig. 6

In this design, the plunger or armature (202) moves up and down between the upper and lower pole pieces (200a, 200b). Id. at col. 12, ll. 15-29. This moves the attached actuating pin (204), which linearly actuates a valve or other device. Id. at col. 12, ll. 7-12. For example, to move the armature downward, the lower solenoid coil (208) is energized, thus magnetizing the housing and lower pole and creating a magnetic force that attracts the armature (202). Id. at col. 12, ll. 15-20. The current to the solenoid can be shut off once the armature is in contact with the lower pole because the armature will remain latched against the lower pole by the residual magnetism exerted by the material. Id. at col. 12, ll. 59-66; col. 13, ll. 22-24. To then move the armature upward, the upper solenoid coil (206) is energized. This, in turn, pulls the armature to the upper pole. When the armature touches the upper pole, the current to the solenoid is again shut off and the armature remains latched via residual magnetism.

In the late nineteen-eighties, Mr. Sturman worked for Cummins Engine Co. on fuel injector valves. While at Cummins, Mr. Sturman alleges he developed a fuel injector valve using residual magnetic latching. Caterpillar notes, however, that all of the resultant designs used permanent

magnets. Later, in the early nineteen-nineties, Sturman was developing applications for residual magnetism for both BKM, a California fuel injection consulting firm, and the United States Navy, among others.

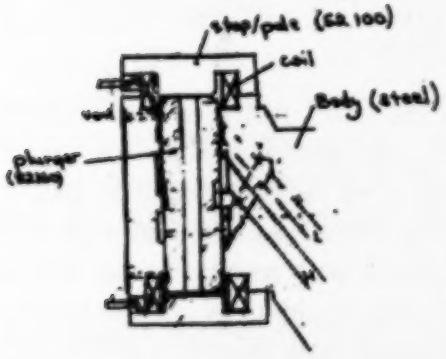
In 1991, Caterpillar and Sturman executed a Consultant Agreement to develop electronically controlled actuators and related driver circuits for possible applications in fuel systems for diesel engines. In 1992, the parties replaced the Consultant Agreement with a Joint Development Agreement (JDA). The purpose of the JDA was to develop "ACTUATORS and DRIVER CIRCUITS for CATERPILLAR's exclusive use in fuel systems for diesel engines."

Under the JDA, Sturman agreed to assign Caterpillar "INTELLECTUAL PROPERTY made or conceived by [Sturman] personnel, either alone or with others (a) pursuant to the [joint development program] or (b) resulting from CATERPILLAR'S PROPRIETARY INFORMATION." The JDA defined "INTELLECTUAL PROPERTY" as "patentable inventions, patents, copyrights, technical trade secrets and/or technical PROPRIETARY INFORMATION." Caterpillar agreed to pay Sturman royalties on any uses of such intellectual property going forward, even after termination of the JDA.

Pursuant to the JDA, Sturman and Caterpillar jointly developed actuators and driver circuits for fuel injection in diesel engines. The work related primarily to poppet valves using linear actuators, which operate under principles similar to those described above with respect to the '898 patent. The complete systems are known as mechanically actuated, electronically controlled unit injectors (MEUIs). Sturman assigned its rights in these inventions to Caterpillar, which obtained U.S. Patent Nos. 5,407,131 and 5,494,219 claiming such technology (the '131 patent and '219 patent,

respectively). The MEUI designs under consideration under the JDA had demanding physical requirements. They had to open and close nine hundred times per second, with a required life of a billion cycles. In addition, they required a sixty pound latching force over a 0.002 inch air gap. Thus, to make use of residual magnetic latching (as opposed to permanent magnets), it became necessary to find a material with both the necessary magnetic and physical characteristics capable of withstanding such demanding operational requirements. Caterpillar engineers Maley and Tharp engaged in this search, ultimately identifying hardened 52100 and 4140 steels as appropriate for residual magnetic latching in a MEUI.

From September 1 to September 3, 1992, Sturman and Caterpillar engineers met at Jumers Castle Lodge, a hotel in Peoria, Illinois, to discuss fuel injector designs. On the second day, the team met to "brainstorm alternate system designs." The following morning, Mr. Sturman sketched an idea for an integrated spool valve employing residual magnetic latching using 52100 steel (below).



(Jumers Drawing.) Mr. Sturman marked his sketch "Confidential."

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The integrated spool valve works on different principles than the armature-with-connecting-pin design described above. The design eliminates the need for a separate armature and connecting pin; it integrates the armature function into the body of the spool itself. As depicted in the Jumers Drawing, an integrated spool valve comprises a spool-shaped piece—marked "plunger (52100)"—that moves back and forth within a cylindrical housing. When it moves from one position to another, it opens and closes different flow channels cut around the circumference of the spool. In the integrated spool valve, electromagnetic pole pieces reside at opposite ends of the spool. When an electric current is applied to the electromagnetic pole pieces at one end of the device, the spool is magnetically attracted thereto. After the spool has reached the end and the current has been shut off, residual magnetism latches the spool in place. When a current is drawn through the pole pieces at the opposite end (while a small current is passed through the latched end to demagnetize it), the electromagnetic force pulls the spool, causing it to slide towards and latch at the other end.

Caterpillar rejected the idea for a spool valve design for a MEUI for a variety of reasons, but primarily because it was not suitable for high pressure 30,000 psi fuel systems. Under these operating conditions, the valve leaked too much. Sturman agreed with this assessment and the parties did not further develop the idea of a spool valve for use in a MEUI. Nonetheless, Caterpillar engineers did recognize that Sturman's integrated spool valve design had "tremendous potential."

In fact, Caterpillar began exploring the idea of using an integrated spool valve for a hydraulically actuated, electronically controlled unit injector (HEUI). The district court found that contemporaneous memoranda indicate that the idea came from Sturman's design, as presented in the

Jumers Drawing. Caterpillar never informed Sturman about its work using an integrated spool valve for a HEUI. Instead, it treated this project as independent and outside of the JDA.

By its own terms, the JDA expired in July 1993. To avoid paying ongoing royalties to Sturman under its terms, Caterpillar sought to amend the JDA. It offered Sturman a lump-sum payment of $275,000 and sought a release of any claims involving the JDA in exchange. The parties executed the amendment on November 30, 1993.

In negotiating the release, Sturman repeatedly sought to determine which intellectual property arose under the JDA. In particular, as reflected in Mrs. Sturman's handwritten notes from an October 22, 1993, teleconference regarding the potential buy-out, the release was "to cover everything generated in the program," specifically the "2 applications w/ Eddie as co-inventor." A letter dated November 16, 1993, from Anthony Woloch in Caterpillar's patent department listed as "the inventions naming Eddie as a co-inventor and arising under the [JDA]," the two patent applications that matured into the '131 and '239 patents. This letter also asked Mr. Sturman to fill out an enclosed form if he believed any other inventions arose under the JDA. Finally, on the date the parties signed the amendment, Mrs. Sturman's handwritten notes reflect that she asked whether the release would cover "just these 2 applications as spelled out [in the] Nov. 16 letter from CAT?" According to the notes, Caterpillar responded that the "$275,000 will cover whatever CAT [received] during our time together" and would "cover anything from the program that [Caterpillar] utilized now or in the future."

Following the 1993 dissolution of the JDA, Sturman began working on numerous other projects as a consultant. Much of this work focused on integrated spool valve designs

for clients including Navistar and BKM. In February 1994, Sturman published an article describing this technology in *Machine Design*. That spring, Sturman also filed two patent applications claiming this technology. The first application related to two-, three-, and four-way versions of the integrated spool valve technology and issued as U.S. Patent No. 5,640,987 (the '987 patent). The second application related to three- and four-way integrated spool valves for a HEUI and issued as U.S. Patent No. 5,460,329 (the '329 patent). Both patents are related to the spool-valve design depicted in Mr. Sturman's Jumers Drawing.

Meanwhile, Caterpillar continued its own work with an integrated spool valve design for use in a HEUI. In May 1994, Caterpillar's counsel drafted a patent application covering this technology. The application named Mr. Sturman as a co-inventor. Caterpillar therefore asked Mr. Sturman to sign the patent application and assign Caterpillar his rights in the invention. Mr. Sturman refused, claiming he had invented the technology outside the JDA. In response to the request, Mrs. Sturman sent Caterpillar a letter dated June 14, 1994, which stated:

> Upon review of Patent Application No. 92-463, we have found that there must be some mistake. Sturman Industries has already applied for a similar patent independently. As per your letter of November 16, 1993, there were only two inventions that were derived out of our [JDA] . . . . The material in your Patent Application No. 92-463 is almost identical to work that Sturman Industries . . . did independently of Caterpillar.

In light of this, Caterpillar filed two separate applications. One was directed to two-way valves, which Mr. Sturman refused to sign and went abandoned. The other was directed

to three-way valves, which did not name Mr. Sturman as an inventor and ultimately issued as U.S. Patent No. 5,479,901 (the '901 patent).

B. Prior Proceedings

On June 28, 1999, Caterpillar filed a complaint against Sturman in the United States District Court for the Central District of Illinois. Among other things, Caterpillar brought claims alleging Sturman violated the Illinois trade-secret statute, breached the JDA, and unlawfully converted Caterpillar's property. Caterpillar also sought correction of inventorship of Sturman's '329 and '987 patents. In response, Sturman counterclaimed, seeking, inter alia, correction of inventorship of the '901 patent and alleging fraudulent inducement of the amendment to the JDA.

Before trial, Caterpillar moved for summary judgment on Sturman's counterclaims. The district court granted-in-part Caterpillar's motion on the basis that many of Sturman's counterclaims were barred by the release in the amendment to the JDA and, further, because Sturman did not present genuine issues of material fact that it was fraudulently induced into signing that amendment. Caterpillar Inc. v. Sturman Indus., Inc., No. 99-1201 (C.D. Ill. Dec. 10, 2001) (order denying, inter alia, Sturman's fraudulent inducement claim). Among other things, the district court denied-in-part Caterpillar's summary judgment motion on Sturman's counterclaim seeking correction of inventorship of the '901 patent. Id.

At the beginning of trial, during the jury selection process, Sturman moved to dismiss for cause any current or former Caterpillar employees and their spouses. The district court denied Sturman's blanket objection, but specifically allowed Sturman to show cause for individual jurors. During that process, over Caterpillar's objections, Sturman sought to

strike for cause any potential jurors with close ties to Caterpillar. The district court dismissed one juror whose husband was in management at Caterpillar, but refused to dismiss other jurors who simply had a connection to certain of Caterpillar's union-contract employees. Sturman did not individually challenge for cause Juror No. 3,[1] the spouse of a current Caterpillar employee, nor did it use one of its peremptory challenges to have her removed. Juror No. 3 ultimately sat on the jury.

At the conclusion of Caterpillar's case on the merits, Sturman moved for judgment as a matter of law (JMOL) under Rule 50(a) of the Federal Rules of Civil Procedure. Sturman argued that, based on Caterpillar's evidence, no reasonable juror could rule in favor of Caterpillar on its trade-secret, breach-of-contract, and conversion claims. The district court denied Sturman's motion. See Caterpillar Inc. v. Sturman Indus., Inc., No. 99-1201 (C.D. Ill. July 12, 2002) (order denying Sturman's motion for JMOL).

Thereafter, Sturman presented its case to the jury. As part of its case, Sturman sought to introduce into evidence DX410, an internal Caterpillar report prepared before the litigation discussing the merits of material choices for the spool valve. Caterpillar objected to the introduction of DX410. The district court sustained the objection, finding that its probative value was substantially outweighed by the danger of unfair prejudice and potential to mislead the jury. See Caterpillar Inc. v. Sturman Indus., Inc., No. 99-1201 (C.D. Ill. July 16, 2002) (order sustaining Caterpillar's objection to the admission of DX410).

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[1] "Juror No. 3" refers to the juror who filled out Juror Questionnaire No. 3, not the juror who was seated third.

The jury ruled in favor of Caterpillar on all counts before it. In response to a special interrogatory regarding the trade secret, the jury found that Caterpillar "proved by a preponderance of the evidence that workable magnetic latching in the fuel injector valve in the absence of permanent magnets via the use of a housing and armature made of a material with sufficient residual magnetism was first made or conceived pursuant to the [JDA]." With respect to the trade-secret misappropriation claim, the jury found in favor of Caterpillar and awarded $1.00 in nominal damages and $1.32 million in restitution for unjust enrichment. With respect to the breach-of-contract claim, the jury found that Sturman breached a variety of different clauses in the JDA but awarded only $1.00 in nominal damages. Finally, the jury also found in favor of Caterpillar on its conversion claim.

The district court conducted a bench trial on the correction-of-inventorship claims. On Caterpillar's claims for correction of inventorship of Sturman's '329 and '987 patents, the court held that Caterpillar failed to rebut, by clear and convincing evidence, the presumption that Sturman, the named inventor, was the true and only inventor. See Caterpillar Inc. v. Sturman Indus., Inc., No 99-1201, slip op. 40 (C.D. Ill. Feb. 6, 2003) (Caterpillar Opinion). It therefore denied Caterpillar's co-inventorship claim. On Sturman's counterclaim for correction of inventorship of the '901 patent, however, the district court found that Sturman had presented clear and convincing evidence to rebut the presumption that the Caterpillar engineers named on the patent were the true and only inventors. See id. Consequently, the court named Sturman as the sole inventor of the '901 patent.

Thereafter, based on the jury findings, the district court granted Caterpillar additional remedies. Notwithstanding the district court's inventorship findings in favor of Sturman regarding the '329 and '987 patents, the

district court granted Caterpillar's request for specific performance, ordering Sturman to assign Caterpillar sole ownership of those patents. See Caterpillar Inc. v. Sturman Indus., Inc., No. 99-1201 (C.D. Ill. Feb. 11, 2003) (order directing specific performance). The district court noted that the ruling depended on the jury's verdict that Sturman breached the IP-assignment clause in the JDA and converted the '329 and '987 patents in violation of Illinois law. In addition, the court imposed a constructive trust on all monies received by Sturman attributable to the '329 patent prior to January 2, 1996, at which point Caterpillar's '901 patent issued, ending any trade-secret claims. See Caterpillar Inc. v. Sturman Indus., Inc., No. 99-1201 (C.D. Ill. Feb. 10, 2003) (order imposing constructive trust).

On February 12, 2003, the district court entered final judgment in Caterpillar's favor on all litigated claims. See Caterpillar Inc. v. Sturman Indus., Inc., No. 99-1201 (C.D. Ill. Feb. 12, 2003). Sturman subsequently filed timely motions for judgment as a matter of law and for a new trial, which the district court denied. See Caterpillar Inc. v. Sturman Indus., Inc., No. 99-1201 (C.D. Ill. May 29, 2003) (order denying Sturman's renewed motion for JMOL); Caterpillar Inc. v. Sturman Indus., Inc., No. 99-1201 (C.D. Ill. May 30, 2003) (order denying Sturman's motion for a new trial). On June 3, 2003, Sturman filed a timely notice of appeal. Caterpillar responded with a timely notice of cross-appeal on June 27, 2003. After entering an amended judgment on June 30, 2003, see Caterpillar Inc. v. Sturman Indus., Inc., No. 99-1201 (C.D. Ill. June 30, 2003), Sturman filed a corrected amended notice of appeal on July 3, 2003, and Caterpillar filed an amended notice of cross-appeal on July 9, 2003.

We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

II. DISCUSSION

Sturman appeals (1) the district court's decision to allow Juror No. 3 to sit on the jury; (2) the district court's denial of Sturman's motions for judgment as a matter of law on Caterpillar's trade-secret and breach-of-contract claims; (3) the district court's exclusion of DX410 from evidence before the jury; (4) the district court's assignment of Sturman's '329 and '987 patents to Caterpillar on the basis of the jury's verdicts; and (5) the district court's grant of summary judgment in favor of Caterpillar on various Sturman counterclaims, particularly the fraudulent inducement counterclaim, as having been released under the amendment to the JDA.

Caterpillar cross-appeals (1) the district court's decision denying Caterpillar's claims that its engineers Maley and Tharp were joint inventors of the '329 and '987 patents; (2) the district court's decision that Sturman was the sole inventor of the '901 patent; and (3) the district court's limitation of Caterpillar's state unjust enrichment remedies as preempted by federal law.

We address each of these issues in turn.

A. Whether the District Court Erred By Seating Juror No. 3

1. Standard of Review

The parties disagree as to the applicable standard of review. Caterpillar argues the more common abuse-of-discretion standard applies, while Sturman contends this case presents a legal question of implied bias, which is reviewed de novo.

Typically, the redress for an assertion of jury bias at the trial court is a hearing at which the defendant is afforded

the opportunity to prove actual bias. Smith v. Phillips, 455 U.S. 209, 217 (1982). "While the Supreme Court has held that the question of whether an individual juror is biased is a factual determination entitled to deference on review," however, "it has never 'precluded the use of the conclusive presumption of bias' in 'extreme' or 'extraordinary cases.'" Hunley v. Godinez, 975 F.2d 316, 318 (7th Cir. 1992) (quoting Smith, 455 U.S. at 217 (O'Connor, J., concurring)). Thus, in cases of implied bias, as opposed to actual bias, "[w]hether a juror's partiality may be presumed from the circumstances is a question of law," which we review de novo. Id.; see also Skaggs v. Otis Elevator Co., 164 F.3d 511, 517 (10th Cir. 1998) ("The determination of implied bias is a question of law reviewed de novo.")

As discussed in detail below, Sturman's arguments relate to whether the district court should have dismissed for cause Caterpillar employees, retirees, and their spouses due to their interest in the case, not whether Juror No. 3 had actual bias (which would be a factual question). Accordingly, Sturman presents a legal question of whether Juror No. 3 was impliedly biased and de novo review applies.

2. Arguments

Sturman argues that the district court erred by allowing Juror No. 3, the spouse of a Caterpillar employee, to sit on the jury. Juror No. 3's marriage to an employee of a party and consequent financial interest in the case, Sturman contends, required the court to excuse her under United States v. Polichemi, 219 F.3d 698, 704 (7th Cir. 2000), and Getter v. Wal-Mart Stores, 66 F.3d 1119, 1122 (10th Cir. 1995). As Sturman points out, it therefore moved before trial to excuse all such potential jurors (including Juror No. 3) for cause, even warning the district court that failure to do so could warrant finding a mistrial. Contrary to Caterpillar's arguments at the district court that the exclusion of these

potential jurors would violate the rule set forth in Batson v. Kentucky, 476 U.S. 79 (1986), which prohibits, under the Equal Protection Clause, challenging potential jurors solely on the basis of their race, Sturman asserts there is no constitutional right to have the employees of a party and their spouses sit on a jury, even if that party employs a large percentage of the local population. In addition, according to Sturman, having raised the blanket objection to the presence of such jurors, it was not required to raise the same point individually for each potential juror, nor was it required to use a peremptory challenge to dismiss the juror.

Caterpillar counters that Sturman waived its right to appeal the presence of Juror No. 3 because it did not individually object to her presence when offered the opportunity to do so by the district court. Sturman's blanket objection did not suffice, according to Caterpillar, because "[s]uch a 'class' is not presumed biased as a matter of law; rather, bias must be shown individually." Appellee's Br. 24. As such, Caterpillar contends, the district court did not abuse its discretion in denying Sturman's blanket objection and directing it to make individual for-cause showings. Citing Zamora v. Guam, 394 F.2d 815, 816 (9th Cir. 1968), Caterpillar argues Sturman waived objection by not making an individual motion to strike Juror No. 3 for cause. Moreover, Caterpillar asserts, the cases Sturman relies on do not hold that Juror No. 3 is biased as a matter of law. Caterpillar particularly points out that the juror at issue in Getter was challenged individually and presumed biased in part because of his stockholdings in Wal-Mart, not simply his spouse's employment there.

3. Analysis

The threshold issue with regard to the question of juror bias is whether the district court correctly concluded that Sturman waived objection to the presence of Juror No. 3

on the jury. If we disagree with the district court as to the waiver issue, we must subsequently determine whether Juror No. 3 should have been deemed biased as a matter of law.

a. Whether Sturman Waived Objection to Juror No. 3

We hold that Sturman did not waive objection to Juror No. 3, who was married to a Caterpillar employee. If a party fails to raise an argument at trial, it waives any appeal of that issue because, barring a few exceptions, an appellate court does not consider arguments first made on appeal. See Datamatic Servs. v. United States, 909 F.2d 1029, 1034 (7th Cir. 1990). In this case, in considering Sturman's Motion for a New Trial Pursuant to Rule 59 of the Federal Rules of Civil Procedure, the district court had already considered the waiver issue, concluding that Sturman waived objection to Juror No. 3 by declining to individually challenge her for cause when offered the opportunity to do so. See Caterpillar Inc. v. Sturman Indus., Inc., No. 99-1201 (C.D. Il. May 30, 2003) (order denying Sturman's motion for a new trial). The court therefore concluded that Sturman could not, at that late stage in the trial, challenge the propriety of Juror No. 3. Id. (relying on Frazier v. United States, 335 U.S. 497, 513 (1949)).

In most cases, we are the first to consider the legal question of whether a party waived appeal of an issue, basing that decision on underlying facts. E.g., Sage Prods., Inc. v. Devon Indus., Inc., 126 F.3d 1420, 1426 (Fed. Cir. 1997). In considering the question of waiver here, however, we find ourselves reviewing the district court's conclusion that Sturman waived objection to Juror No. 3. Because the issue of waiver on appeal and the issue of waiver on a request for a new trial require the same legal determination based on the same underlying facts, we review the district court's legal

determination de novo and factual determinations for clear error.

Having reviewed the transcript from the jury selection process in detail, we hold that Sturman did not waive objection to Juror No. 3. At the onset of the jury selection process, Sturman requested that the district court hear challenges for cause. Sturman noted that these challenges fell into two categories. "One [was] current employees or retirees from Caterpillar," and the other was those closely related to them, for example, spouses or children. Sturman had a list of eleven people that it challenged for these reasons, including Juror No. 3. Discussing the motion with counsel in chambers, the court treated it as one to strike for cause all retirees and current employees of Caterpillar, as well as all spouses of retirees or current employees of Caterpillar.

Caterpillar contested the motion, arguing that the jury would not be representative of the community if people were dismissed on the basis of having ties with Caterpillar. In response, Sturman argued that it was not appropriate to have people on the jury whose financial livelihood came from a party to the proceedings. Even if these potential jurors claimed to be impartial, Sturman asserted, it was unlikely to be true given their inherent interest in the case. Sturman then reiterated that the challenge centered on current and retired Caterpillar employees and their spouses. Caterpillar concluded the discussion by contending any such blanket exclusion of potential jurors would violate the Supreme Court's decision in Batson.

In ruling on Sturman's challenges for cause, the district court sided with Caterpillar on the basis that "it would not be a representative community without some Caterpillar connection." It did, however, exclude those potential jurors who knew potential witnesses. The district

court also noted that, once it excluded this group, "any others you [Sturman] will have to make your record"; for those the court would "make a decision individually." The court reiterated, after excusing three potential jurors for knowing potential witnesses, "if you [Sturman] want to make individual motions for cause . . . you can. We will take them up individually."

In making individual challenges for cause, Sturman argued beyond the parameters of the initial blanket objection, noting additional ties to Caterpillar. For example, with respect to one potential juror, Sturman noted that both daughters worked at Caterpillar. With respect to another, Sturman noted that, in addition to having her husband work at Caterpillar, her father had worked there and her son in law currently worked there.

While Sturman made its individual challenges, Caterpillar repeatedly objected that Sturman was simply rearguing its previous blanket objection individually. Caterpillar made this argument at least three separate times. For example, Caterpillar contended that "now what we're doing is going one by one, and [Sturman] is going to make the argument with respect to each person that he is a current or retired person at Caterpillar, deriving a paycheck. Well, that is the same thing as striking all these people for cause." In response, Sturman reminded the court that it "made a motion in the beginning for a group of people to try to expedite this matter. We could have gone one by one."

During the individual for-cause arguments, the district court focused on whether each potential juror worked in management or held a union-contract position at Caterpillar, or whether the potential juror's spouse was in management or held a union-contract position. The court explained its rationale by stating "if someone is in a union, they have a union contract, it solely isn't at the whim of

management. If they are considered management, then they're not protected by a union contract. And I presume they may even have employment at will, and that makes a big difference, in my mind." Sturman disagreed with this logic, arguing that the dividing line was not appropriate because both management employees and employees under a union contract would have a financial interest in the outcome of the case.

Nearing the end of the process, Sturman returned to the issue of one of the potential jurors that the judge had originally passed on. In doing so, Sturman stated it would "not move to strike either of the latter two [jurors], although they have significant contact with Caterpillar—sons, as well as one of them's got a grandson—but we do renew our motion on [Juror]." The judge subsequently struck this juror because of his work in Caterpillar management.

Based on this record, we conclude Sturman did not waive objection to the presence of Juror No. 3 on the jury. While Sturman began its objection by more broadly trying to exclude all current and retired Caterpillar employees and their immediate family, the judge immediately narrowed the issue to one of current and retired Caterpillar employees and their spouses. The parties focused their arguments on this alleged ground for dismissal, making the arguments detailed above. Considering this basis alone as the reason for Sturman's for-cause challenges, the judge refused to dismiss any potential jurors. Thus, it is clear that Sturman voiced its objection to these potential jurors for reasons of implied bias, and the court distinctly ruled on the objection.

Further, we disagree with Caterpillar and the district court that Sturman had to individually challenge Juror No. 3 to later avoid waiving its objection. To begin, Caterpillar's waiver arguments on appeal that Sturman was required to make individual objections to each and every juror are

inconsistent with its position before the district court. As detailed above, Caterpillar repeatedly objected to Sturman's individual objections to jurors at trial, contending that all Sturman was doing was making the same arguments it made in its blanket objection. It therefore repeatedly asked the judge to deny Sturman's individual objections as having already been ruled on.

In any event, while the judge did advise Sturman to object to specific jurors individually after refusing to dismiss those jurors under Sturman's blanket objection, the context of those individual challenges reveals that the judge's request sought to elicit more factually particularized challenges where appropriate. In other words, having previously rejected Sturman's blanket objection, the judge would allow Sturman to make challenges for reasons supplemental to the original blanket objection, allowing Sturman to point out additional facts that might have warranted dismissing a potential juror for cause. This is best demonstrated by the fact that (as discussed) Sturman brought up additional facts about the individual jurors beyond the reasons given in the original blanket objection, particularly the employment by Caterpillar of other immediate family members. This is also highlighted by the judge's focus on whether an employee held a management or union-contract position at Caterpillar, a matter of fact beyond the bounds of the blanket objection. In making these additional arguments in its individual challenges, Sturman was going beyond the parameters of the original challenge.

Indeed, Sturman specifically stated it would not individually challenge Juror No. 3, despite having additional reasons for doing so. This highlights two things. First, as mentioned above, when the judge requested that Sturman make individual challenges, Sturman treated that request as seeking additional reasons for dismissing jurors, above and beyond the reasons for its blanket objection. Second, by

failing to do so, Sturman waived its right to appeal the issue of implied bias potentially resulting from any additional family connections to Caterpillar, having failed to preserve the record on this issue. Nonetheless, by its original objection on the record, Sturman preserved the blanket issue of whether Juror No. 3 should be presumed biased because of her husband's employment at Caterpillar.

Our holding is consistent with Zamora v. Guam, 394 F.2d 815, 816 (9th Cir. 1968), cited by Caterpillar in support of its argument. In Zamora, the United States Court of Appeals for the Ninth Circuit refused to overturn a guilty verdict based on allegations of juror bias. In that case, the defendant, Zamora, was charged with robbery after a police line-up. At trial, the defense attorney made a general objection to the presence of "repeat" jurors—jurors who had been on the jury for a previous murder trial against Zamora. The trial judge refused to dismiss all such jurors for cause, but "announced that defense counsel could explore the matter of prejudice with any juror." Id. Defense counsel did not question individual jurors as to any bias. The Ninth Circuit therefore concluded that defense counsel had made a deliberate choice of trial tactics by not pursuing the issue individually, thereby waiving the issue on appeal. Id.

Zamora is distinguishable from this case. As discussed before, actual bias and implied bias require the application of different legal tests. The bias at issue in Zamora was actual bias. Thus, the trial judge allowed defense counsel to "explore the matter of prejudice with any juror." This indicates that the bias at issue was a factual question that required inquiry of individual jurors. The bias at issue here, implied bias, did not require such factual inquiry because it is an issue of law. The relevant facts—ties to Caterpillar through employment, retirement, or immediate relatives—were already on the record as a result of the voir dire process. Part of the rationale for the waiver

doctrine—to encourage parties to develop a full record of the case—is therefore not applicable. In addition, Sturman already satisfied another rationale for the waiver doctrine—expeditiously informing the court about potential errors so as to put the court on notice of mistakes that, if left uncorrected, may result in reversal on appeal. Because this case deals with a legal question of implied bias, not actual bias, and the relevant facts were established during voir dire, Sturman preserved this issue by making its general objection.

b. Whether Juror No. 3 was Biased as a Matter of Law

Having concluded from the record that Sturman did not waive objection to Juror No. 3, we must determine whether Juror No. 3 was biased as a matter of law such that the district court should have dismissed her. We conclude the district court erred by not dismissing Juror No. 3 for cause because she was biased as a matter of law.

Because the issue of juror bias is not an issue of patent law or procedurally related thereto and this case arose in the Central District of Illinois, we apply the law of the Seventh Circuit with regard to the issue of implied bias. See Utah Med. Prods., Inc. v. Graphic Controls Corp., 350 F.3d 1376, 1381 (Fed. Cir. 2003). We also look to opinions of the other regional circuits for their persuasive authority.

Courts may use the doctrine of implied bias to dismiss a potential juror in extraordinary circumstances. See Hunley, 975 F.2d at 318; see also Getter, 66 F.3d at 1122. This helps ensure the right to an impartial jury and a fair trial. Skaggs, 164 F.3d at 514-17.[2] A party may demonstrate

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[2] As the court noted in Skaggs, the Seventh Amendment guarantees a civil litigant the right to a trial by jury. 164 F.3d at 514. And while this right is not the same as that guaranteed by the Sixth Amendment, which

implied bias by "showing that the juror has a 'personal connection to the parties or circumstances.'" Id. at 517 (quoting Gonzales v. Thomas, 99 F.3d 978, 987 (10th Cir. 1996)); see also Hunley, 975 F.2d at 319 (noting that, in criminal cases, potential jurors have been presumed biased in cases where they have been the victim of a crime or have experienced a situation similar to the one at issue in the trial). Specific examples of extraordinary circumstances in civil cases include owning stock in a corporation that was a party to the suit, Gladhill v. General Motors Corp., 743 F.2d 1049, 1050 (4th Cir. 1984); see also Getter, 66 F.3d at 1122 (concluding potential juror was biased as a matter of law because of stock ownership and his wife's employment at defendant-company); as well as working as an employee of a party, see Francone v. Southern Pacific Co., 145 F.2d 732, 733 (5th Cir. 1944); United States v. Haynes, 398 F.2d 980, 984 (2d Cir. 1968).

The doctrine of implied bias has been addressed in detail by several circuit courts, including the Seventh Circuit. In Polichemi, the Seventh Circuit reevaluated its original conclusion that a juror should have been dismissed as a matter of law in light of an intervening Supreme Court case. In the original criminal trial at the district court, the defendants argued that a potential juror should be excluded on the ground of implied bias because she was a long-time employee of the United States Attorney's Office that was conducting the prosecution. The district court refused to dismiss her for cause. On petition for rehearing, the Seventh Circuit affirmed its prior conclusion that the district court

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grants the right to an "impartial" jury, it applies equally as a result of the Fifth Amendment's due process protections. Id. Moreover, while most of the reported cases deal with the issue of implied bias in criminal proceedings, and therefore the Sixth Amendment, the reasoning of those cases is "germane" to the Seventh Amendment analysis here. Id. at 515 n.2.

should have excused the potential juror when the defendants moved to strike her for cause. It noted that "a court must excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case." Id. at 704 (citing Getter, 66 F.3d at 1122) (emphasis added). Furthermore, the court so concluded despite assurances from the potential juror during voir dire that she could be fair and impartial. Id. at 703. Based on the close relationship between the potential juror and the prosecuting office, the Seventh Circuit concluded that the potential juror should have been dismissed as a matter of law, noting that "the law errs on the side of caution." Id. at 704.

In Getter, the plaintiff sued Wal-Mart because she was injured in a slip and fall accident. At the district court, Getter challenged a prospective juror both because he owned stock in Wal-Mart and his wife was employed there. Getter, 66 F.3d at 1122. The district court refused to dismiss the juror for cause, however, and Getter used a peremptory challenge. Id. The appellate court began its review by noting that extraordinary conditions call for a presumption of bias, listing as examples of such conditions ownership of stock in a company or working for a corporation that was a party to the suit. Id. "In these situations, the relationship between the prospective juror and a party to the lawsuit points so sharply to bias in [the] particular juror that even the juror's own assertions of impartiality must be discounted in ruling on a challenge for cause." Id. (internal quotes omitted). Consequently, the court found that the district court abused its discretion as a matter of law by not dismissing the juror for cause. Id. "Due to his stock ownership and his wife's employment, Mr. Agin's financial well-being was to some extent dependent upon defendant's. This is precisely the type of relationship that requires the district court to presume bias and dismiss the prospective juror for cause." Id.

We conclude that the district court should have dismissed Juror No. 3 for implied bias. Juror No. 3 had a financial interest in this case because her husband worked for Caterpillar at the time of the trial. As noted in Polichemi, even a tiny financial interest is enough to warrant dismissal. And it is legally irrelevant whether this financial interest arose due to his employment in management or under a union contract. We therefore disagree with the district court's reasoning during the jury selection process, whereby it either retained or dismissed potential jurors based on, respectively, employment under a union contract or, alternatively, in management. In either case, there is a financial interest in the outcome of the case. In addition, we find no distinction in the law between the financial interest of an at-will management employee and the interest of an employee under a union contract, nor do we advocate creating one.

The situation of Juror No. 3 is akin to the juror in Getter. As discussed, in Getter, the Tenth Circuit found that the district court erred by failing to dismiss a potential juror in part because he was married to a woman who worked for the defendant. Although there is no record in this case regarding stock ownership, as in Getter, Juror No. 3's "financial well-being was to some extent dependent upon defendant's." Id. She should have been presumed biased and dismissed for cause, despite assurances that she could be fair and impartial. See id.; Polichemi, 219 F.3d at 703.

Having concluded that Sturman preserved its objection to Juror No. 3 and that she was biased as a matter of law, we reverse the district court's decision to empanel Juror No. 3.[3] Because Juror No. 3 actually sat on the jury, we vacate the jury's verdicts in favor of Caterpillar on its

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[3] Notably, Sturman did not have to use a peremptory challenge to correct the district court's error. United States v. Martinez-Salazar, 528 U.S. 304, 316 (2000).

claims of trade-secret misappropriation, breach of contract, and conversion, and order a new trial thereon. See Martinez-Salazar, 528 U.S. at 316 (ordering a new trial because a biased juror actually sat on the jury).[4] In addition, we also vacate the district court's grant of specific performance ordering Sturman to assign the '329 and '987 patents to Caterpillar because the grant of this remedy was based purely on the jury's verdict.

B. Summary Judgment on Sturman's Fraudulent Inducement Counterclaim

As one of its counterclaims at trial, Sturman alleged that Caterpillar fraudulently induced it to execute the amendment to the JDA by misrepresenting its scope. At trial, Caterpillar filed a motion for summary judgment as to all of Sturman's counterclaims, which the district court resolved in Caterpillar's favor. With respect to the fraudulent inducement claim, the district court held that the evidence produced was insufficient to create a genuine issue of material fact and thereby preclude summary judgment. In particular, the court found that Mrs. Sturman's contemporaneous notes from the negotiations of the terms of the amendment demonstrated that Caterpillar clearly "communicated to Sturman that the release was to cover anything from the JDA that Caterpillar was utilizing or would utilize in the future." It further found Mr. Sturman's affidavit self-serving and insufficient to create a genuine issue of material fact. It therefore concluded that Caterpillar

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[4] Based on our decision, we do not address two other issues raised by Sturman on appeal: (1) whether the district court properly denied Sturman's motion for judgment as a matter of law; and (2) whether the district court properly excluded DX410 from evidence. Finally, we do not address the cross-appeal issue of whether the district court properly limited state unjust enrichment remedies as preempted by federal law.

did not fraudulently induce Sturman into signing the JDA amendment.[5]

We review the district court's grant of summary judgment de novo. See Davis v. Con-Way Transp. Cent. Express, Inc., 368 F.3d 776, 782 (7th Cir. 2004). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

On appeal, Sturman argues that the district court improperly granted summary judgment because there were genuine issues of material fact as to whether Caterpillar fraudulently induced Sturman to enter into the amendment, which contained the release. Sturman contends that Caterpillar falsely represented that it was considering only two inventions (not including the integrated spool valve technology) to be within the scope of the JDA. Given its repeated inquiries into which technology was covered by the JDA, Sturman argues, it was misled, in part, by Anthony Woloch's November 16, 1993, letter, which identified only two Sturman poppet-valve designs as "arising under the JDA." Sturman avers it understood this response to be a representation that Caterpillar did not consider Mr. Sturman's integrated spool valve design to have been made or conceived pursuant to the JDA. According to Sturman, had

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[5] Because the spool valve technology was covered under the JDA—having been disclosed by Sturman to Caterpillar as an alternate solution—and the release applied to all actions arising out of the JDA, the court found that Sturman released all its claims regarding the integrated spool valve design.

it known Caterpillar was using the design, it would have negotiated different terms for the amendment. Furthermore, Sturman contends, the district court erred by dispositively resolving the issue on the basis of Mrs Sturman's contemporaneous notes; at best, it argues, they provide evidence for arguments to a jury. Finally, Sturman notes, a release is not effective against a claim of fraudulent inducement of that release under Illinois law.

Caterpillar contends otherwise, arguing that the district court properly granted summary judgment on Sturman's counterclaims as released under the amendment to the JDA. Focusing on the necessary elements of a fraudulent inducement claim, Caterpillar asserts that Sturman did not raise a genuine issue as to whether Caterpillar made a knowingly false statement of material fact for the purpose of inducing reliance, and that Sturman actually relied to its detriment. In particular, Caterpillar focuses, as did the district court, on Mrs. Sturman's contemporaneous notes, which it contends demonstrate that Sturman knowingly and willingly released all future claims. According to Caterpillar, because Sturman reviewed and signed the unambiguous release language, it cannot contend that Caterpillar misrepresented its scope, which is a legal and not a factual question. In addition, Caterpillar avers, Anthony Woloch's letter does not amount to a false statement because it never suggested that the two inventions over which Caterpillar asserted its rights were the only inventions it believed were conceived under the JDA.

We hold that the district court erred by granting summary judgment in Caterpillar's favor because, in one limited respect, we think that sufficient allegations of fraudulent inducement have been made to create a genuine issue of material fact. The amendment to the JDA, which contained the release, provided, in pertinent part, that Sturman

> release and forever discharge Caterpillar, Inc. . . . from any and all claims, demands, actions or causes of actions at law or equity relating to or arising out of i) ACTUATORS and/or DRIVER CIRCUITS created under the PROGRAM (including derivatives thereof) which are manufactured by CATERPILLAR, . . . and/or ii) any subject matter of the [JDA].

There is a genuine issue as to whether, during the negotiations of the terms of the amendment, Caterpillar knowingly and falsely created the impression that it considered only two inventions to have been developed under the JDA, and that the integrated spool valve design was not one of them.

First, drawing all justifiable inferences in favor of Sturman, there are genuine issues of material fact as to whether Anthony Woloch's letter to Sturman was false or misleading with respect to the contemporaneous negotiation of the JDA amendment. Anthony Woloch, in his letter to Sturman on November 16, 1993, stated that "Exhibit A lists the inventions naming [Mr. Sturman] as a co-inventor and arising under the [JDA] between our companies." But Exhibit A listed only the patent applications that matured into the '131 and '219 patents and never mentioned the spool valve technology.

While we agree with Caterpillar that Woloch's letter did not state that Exhibit A listed the only inventions Caterpillar then believed were created under the JDA, one can justifiably infer that Sturman may have been lulled into thinking that this was then Caterpillar's belief. Likewise, Caterpillar argues that Woloch's letter left open the question of what the JDA covered by asking Sturman if it knew of any other inventions that arose thereunder. But one might also reasonably infer that Woloch's letter suggested that

Caterpillar otherwise had a complete list of the technology created pursuant to the JDA, only to be supplemented by Sturman.

Second, Mrs. Sturman's contemporaneous notes also demonstrate the existence of genuine issues of material fact. Drawing all justifiable inferences, these notes show that Sturman understood Caterpillar's representation regarding the technology at issue to be the "2 applications w/ Eddie as co-inventor," and that Mrs. Sturman asked "Would it be just these two applications as spelled out [in the] Nov. 16 letter from [Anthony Woloch]?" Mrs. Sturman's notes thus reflect the confusion that arose from the language in Anthony Woloch's letter; they suggest that Sturman understood Caterpillar to lay claim to only those two inventions under the JDA mentioned in Woloch's letter.

In conclusion, applying the standard for summary judgment and drawing all inferences in favor of Sturman, we conclude that the district court improperly granted summary judgment in favor of Caterpillar on the issue of Sturman's counterclaim of fraudulent inducement. Specifically, material issues of fact exist regarding whether Caterpillar knowingly intended to deceive Sturman with false statements to induce Sturman's signing of the amendment. In particular, as discussed above, one could justifiably infer from both Anthony Woloch's letter of October 16, 1993, and Mrs. Sturman's contemporaneous notes from the JDA amendment negotiations that Sturman was led to believe that Caterpillar understood the JDA to cover only the two patent applications and not the integrated spool valve technology. It is on this limited basis that we reverse the district court's grant of summary judgment as to the fraudulent inducement counterclaim. Sturman's other allegations of fraudulent inducement concerning the scope of the release raise no material issues of fact, as, under Illinois law, interpretation of the language of the release is a question of law governed by

the "traditional rules of contract interpretation." Hoseman v. Weinschneider, 322 F.3d 468, 473 (7th Cir. 2003). Contrary to arguments advanced by Caterpillar, however, the language of the release cannot be used to prevent a court from inquiring into whether the release itself may have been fraudulently induced. "As with any contract, a release may be set aside if there is fraud in the inducement." Id. at 476 (internal quotations and citations omitted); see also Lawrence v. Muter Co., 171 F.2d 380, 384 (7th Cir. 1940) (noting that fraudulent inducement can serve to vitiate a release even when the release language was unequivocal). We therefore reverse the grant of summary judgment on Sturman's fraudulent-inducement counterclaim in favor of Caterpillar and remand for trial.[6]

C. Caterpillar's Claims of Joint Inventorship of the '329 and '987 Patents

At trial, the court found in favor of Sturman on Caterpillar's claims seeking correction of inventorship to the '329 and '987 patents. Following detailed factual findings, see Caterpillar Opinion at slip. op. 5-21, the district court arrived at this legal conclusion based primarily on the fact that the specific materials identified by Maley and Tharp were not significant to the claimed spool valve technology. See id. at slip op. 44-45. While the district court agreed that Maley and Tharp's research into 52100 and 4140 steels was

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[6] If, upon remand, Sturman is unable to demonstrate that the release was fraudulently induced, the district court's findings (not appealed by Sturman) that the release covered all of Sturman's claims arising under the JDA would stand. Apart from the fraudulent inducement issue, there has been no contention on appeal that the district court's holding that "Sturman's misappropriation of trade secrets claims with respect to the spool valve (Count I), fraud claim (Count V), and breach of contract claim (Count XX) have been released" was erroneous.

important for the poppet valve design developed under the JDA, it found the demands of the integrated spool valve claimed in the '329 patent to be far less. See id. at slip op. 41-42. In particular, the district court found that the spool valve did not require sixty pounds of latching force over a 0.002 inch air gap; it was a zero-air-gap system that, consequently, required much less latching force. See id. at slip op. 4243. The district court also found that the '898 patent taught that "substantially any magnetic material" would latch in a system with zero air gap. See id. at slip op. 43-44. Thus, the court concluded:

> Given the existence of the '898 patent, the existence of texts in the public domain separately detailing the physical and magnetic properties of these materials . . . and the claimed design of the '329 patent, Caterpillar's selection of 52100 and 4140 was merely the exercise of ordinary skill in the art and therefore not a significant addition to the conception of the '329 patent.

Id. at slip op. 44. The district court therefore denied Caterpillar's co-inventorship claim. For the same reasons, it denied Caterpillar's request regarding the '987 patent. See id.

Inventorship is a question of law that we review without deference. See Sewall v. Walters, 21 F.3d 411, 415 (Fed. Cir. 1994). We review the underlying findings of fact for clear error. See Hess v. Advanced Cardiovascular Sys., Inc., 106 F.3d 976, 980 (Fed. Cir. 1997).

On appeal, Caterpillar contends that the district court erred in denying Caterpillar's claims that engineers Maley and Tharp were co-inventors of the '329 and '987 patents. With respect to the '329 patent, Caterpillar notes that the

claims include the limitation "a material with enough residual magnetism to maintain [the] spool position" through residual magnetic latching. Moreover, Caterpillar argues, the preferred materials are the steels researched by Maley and Tharp. According to Caterpillar, because the '329 patent claims were only allowed after being amended to include the "material with enough residual magnetism . . ." limitation, Maley and Tharp materially contributed to the claimed invention. In addition, Caterpillar argues, the district court applied an incorrect inventorship analysis. By finding that the contribution of Maley and Tharp "was not significant as compared to" the spool valve design, Caterpillar asserts, the district court failed to apply the proper test-whether the contribution was "not insignificant in quality" as measured against the whole. Caterpillar also argues that the district court incorrectly found that knowledge regarding which materials would work to achieve residual magnetism was public information that any person of ordinary skill in the art could apply in accordance with the teachings of Sturman's '898 patent.

With respect to the '987 patent, Caterpillar also asserts that Maley and Tharp made a "not insignificant" contribution. In particular, Caterpillar points out, Sturman amended its patent claims to cover residual magnetism in the spool and housing, arguing that the invention relied on hard steel, a feature Sturman learned from Maley and Tharp. Caterpillar notes, however, that Sturman argued over a rejection by saying that the use of hard steels was not taught in the prior art, which included Sturman's '898 patent. In light of the amendments and arguments, Caterpillar avers, the district court erred by finding that Maley and Tharp's contribution did not make a "not insignificant contribution."

In response, Sturman argues that the district court correctly determined that Mr. Sturman is the sole inventor of the '329 and '987 patents. According to Sturman, the only

contribution Maley and Tharp claim to have made—identifying 52100 and 4140 steel for residual magnetic latching—is not actually a claimed feature of either patent; thus, they do not qualify as co-inventors. And while the claims do generally recite a "material with enough residual magnetism to maintain said spool in position" (emphasis added), Sturman points out that Maley and Tharp never worked with Sturman on spool valves. In addition, Sturman avers, their materials search related to a fundamentally different type of design—a poppet valve that requires sixty pounds of latching force across a 0.002 inch air gap. With respect to spool valves, notes Sturman (echoing the district court's findings), the choice of materials would have been an exercise of ordinary skill after the teachings of the '898 patent; the lesser demands of such a valve did not require specific materials.

Patent issuance creates a presumption that the named inventors are the true and only inventors. Hess, 106 F.3d at 980. To rebut this presumption, a district court must find clear and convincing evidence that the alleged unnamed inventor was in fact a co-inventor before correcting inventorship under 35 U.S.C. § 256. Pannu v. Iolab Corp., 155 F.3d 1344, 1350 (Fed. Cir. 1998). "[T]o be a joint inventor, an individual must make a contribution to the conception of the claimed invention that is not insignificant in quality, when that contribution is measured against the dimension of the full invention" Fina Oil & Chem. Co. v. Ewen, 123 F.3d 1466, 1473 (Fed. Cir. 1997). This requires more than merely exercising ordinary skill in the art— "a person will not be a co-inventor if he or she does no more than explain to the real inventors concepts that are well known [in] the current state of the art." Id. Finally, an alleged co-inventor's testimony cannot, standing alone, provide clear and convincing evidence. Ethicon, Inc. v. United States Surgical Corp., 135 F.3d 1456, 1460 (Fed.

Cir. 1998). Instead, an alleged coinventor must supply evidence to corroborate his or her testimony. Id.

We agree with the district court that Caterpillar has not presented clear and convincing evidence to rebut the presumption that Mr. Sturman is the true and only inventor of the '329 and '987 patents. With respect to the '329 patent, we defer to the district court's findings of fact. In particular, we defer to its findings that: (1) neither Maley nor Tharp nor anyone else at Caterpillar had conceived of an integrated spool valve prior to being shown Mr. Sturman's Jumers Drawing, Caterpillar Opinion, ¶ 9, at slip op. 9; (2) Caterpillar's only claimed contribution to the '329 patent was the identification of 52100 and 4140 steel for residual magnetic latching, id. ¶ 10, at slip op. 9; (3) an integrated spool valve such as that claimed in the '329 patent has no air gap and requires significantly less than sixty pounds of latching, id. ¶ 11, at slip op. 10; (4) the contribution of suitable materials for the design claimed in the '329 patent was not significant, id. ¶ 13, at slip op. 11; (5) the '898 patent teaches that "substantially any magnetic materials" will work for residual magnetic latching in a zero-air-gap system such as the '329 patent, id. ¶ 19, at slip op. 14; and (6) various publicly available texts and patents describe the basic magnetic properties of 52100 and 4140 steel, id. ¶¶ 24-25, at slip op. 16-17.

On the basis of the district court's factual findings, we agree with its ultimate legal conclusion that Maley and Tharp should not be named as co-inventors of the '329 patent. As Sturman argues on appeal, the facts found by the district court demonstrate that they neither developed nor worked on an integrated spool valve under the JDA, that such a design does not require as much latching force, and, finally, that the teachings of the '898 patent together with information in the public domain regarding material properties would have made the choice of materials an

exercise of ordinary skill in the art. Thus, the use of 52100 and 4140 steels was an insignificant contribution and does not support their claims of co-inventorship. In addition, we agree with the district court's legal conclusion because the '329 patent claims do not mention either 52100 or 4140 steel and Fina Oil requires that one contribute something to the claimed invention. 123 F.3d at 1473.

Caterpillar's arguments to the contrary are not persuasive. First, we disagree with Caterpillar that Sturman's amendments to the '329 patent claims demonstrate that Maley and Tharp made an inventive contribution. The addition of the "material with enough residual magnetism . . ." limitation is broad; it is not limited to the specific steels identified by Maley and Tharp. Moreover, as the district court found, when used in an integrated spool valve such as claimed in the '329 patent, the teachings of Sturman's '898 patent provide all that is necessary for one of skill in the art to identify the appropriate materials. We also reject Caterpillar's argument that the district court employed the incorrect legal standard. In considering whether Maley and Tharp contributed anything to the '329 patent, the district court specifically weighed the quality of their identification of 52100 and 4140 steel against the value of the whole design, concluding that the contribution was insignificant.

For the reasons discussed above, we also affirm the district court's decision to deny Maley and Tharp co-inventorship of the '987 patent. Specifically with respect to Caterpillar's arguments, we again note that the amendment of the claims was not relevant because the additional language broadly claimed residual magnetism and the '898 patent taught those skilled in the art to identify the appropriate materials. In addition, the distinct hard steel limitation is also irrelevant because the '898 patent teaches that "substantially any magnetic materials" will work for

residual magnetic latching in a zero-air-gap system, whether hard or soft.

D. Caterpillar's Claim of Joint Inventorship of the '901 Patent

With respect to Caterpillar's '901 patent, the trial court found in favor of Mr. Sturman as to his claim of sole inventorship. Caterpillar Opinion at slip op. 46. As the district court explained, Caterpillar's '901 patent generally claims a three-way integrated spool valve for use in a HEUI, in addition to other, more specific features. See id. Noting that Mr. Sturman originated the concept of a two-way integrated spool valve in the Jumers Drawing, the district court evaluated whether the additional features claimed by Caterpillar in the '901 patent "were either significant or more than merely the exercise of ordinary skill in the art." Id. In particular, the district court addressed Caterpillar's arguments that a three-way configuration for use in a HEUI was a significant improvement. See id. at slip op. 47.

The court found that Mr. Sturman first developed this idea, as demonstrated by slides from a presentation to Caterpillar on October 14, 1992. See id. In this presentation, during which Mr. Sturman proposed an "integrated product line" of valves, the court found that Sturman revealed to Caterpillar an idea for a three-way spool valve configuration. See id. at slip op. 47-48. As for Caterpillar's other alleged improvements—hollowing the spool valve, narrowing the waist of the spool, and partially blocking the channels in the spool—the court found that these were either an exercise of ordinary skill in the art or disclosed in the Jumers Drawing. See id. at slip op. 48-49. Consequently, the district court held in favor of Sturman on its counterclaim seeking sole inventorship of the '901 patent. See id. at slip op. 49.

We apply the same standard of review and legal rules detailed above in our discussion regarding Caterpillar's co-inventorship claims to the '329 and '987 patents.

Caterpillar appeals the district court's conclusion that Mr. Sturman was the sole inventor of the '901 patent. In keeping with its arguments regarding the '326 and '987 patents, Caterpillar generally argues that the court erroneously focused on the "heart" of the invention—a spool valve—as opposed to other claimed features, which were not old or disclosed in the Jumers Drawing. First, Caterpillar contends, Sturman never worked with Caterpillar on a three-way spool valve for a HEUI, and certainly never had a "definite and permanent idea" of such a device such that he could be considered the sole inventor. Second, according to Caterpillar, the Jumers Drawing and Sturman's October 14, 1992, presentation mentioning a three-way valve do not evidence conception of the invention claimed in the '901 patent. Specifically with respect to the marketing presentation, Caterpillar argues that nothing suggests that Sturman was introducing a new design for a three-way integrated spool valve for a HEUI. Third, Caterpillar asserts, the district court erred in failing to find any suggestion for combining the claim features it considered within the skill of the art, thereby failing to appreciate the novelty of the combination. Consequently, Caterpillar asks that we reverse the district court's inventorship conclusion because, it insists, Mr. Sturman did not clearly and convincingly show that he alone conceived everything claimed in the '901 patent.

In response, Sturman argues that the district court correctly determined that Mr. Sturman is the sole inventor of the '901 patent. Contrary to Caterpillar's assertions, Sturman contends, Mr. Sturman need not have shown he conceived of everything claimed in the '901 patent. Instead, according to Sturman, Mr. Sturman need only satisfy the inventorship test described above. As it did with respect to the '326 and '987

patents, Sturman counters Caterpillar's arguments that the district court erroneously focused on the "heart" of the invention by asserting that the court correctly applied the law and measured Caterpillar's contribution against the "full measure of the invention," concluding that they did not meet the standard for inventorship. Moreover, according to Sturman many of Caterpillar's arguments relate to findings of fact, which it fails to demonstrate were clearly erroneous. In particular, Sturman points out, the district court found both that Mr. Sturman conceived the idea for a spool valve and suggested the idea for a three-way valve, only after which Caterpillar developed a three-way integrated spool valve for a HEUI and claimed it in the '901 patent.

As the district court found, all the claims generally cover a three-way, dual-solenoid, integrated spool valve used to control the flow of working fluid in a HEUI. Caterpillar Opinion at slip op. 23-24. Notably, we agree with the court's finding that Mr. Sturman conceived of a two-way integrated spool valve. Id. ¶¶ 9-11, at slip op. 25-26. We note also that the district court found that a three-way valve is more complex than the two-way valve conceived by Mr. Sturman. Id. ¶ 13, at slip op. 26. Given this difference in complexity, we conclude that the idea for a three-way valve was "not insignificant in quality, when . . . measured against the dimension of the full invention," Fina Oil, 123 F.3d at 1473, and, consequently, was worthy of an inventorship claim.

We conclude that the district court clearly erred in finding that, in addition to conceiving the design for an integrated spool valve, Mr. Sturman presented clear and convincing evidence that he also conceived the idea of a three-way version of the valve applied to a HEUI. In particular, the district court clearly erred in finding that Mr. Sturman disclosed the idea as part of a proposal for an integrated product line in his October 14, 1992, presentation. Caterpillar Opinion ¶¶ 14-15, at slip op. 26-27. Having

reviewed the slides from the presentation, we agree with Caterpillar that they do not demonstrate that Mr. Sturman conceived of the idea of a three-way integrated spool valve. These slides relate to a presentation entitled "Advanced Solenoid Valve Manufacturing," and one slide particularly related to Mr. Sturman's proposal for an integrated product line. Although that slide does mention both a "2-way valve" and "3-way valve," it does not refer to an integrated spool valve. Nor is there any reference to such a valve elsewhere in the presentation. Instead, as Caterpillar points out, the presentation as a whole relates to plans to continue with the initial proposal for a traditional solenoid valve (such as the one described above in relation to the '898 patent). Consequently, we conclude that the district court's finding that Mr. Sturman disclosed the idea for a three-way integrated spool valve in his presentation to Caterpillar on October 14, 1992, was clearly erroneous.

Accordingly, we reverse the district court's ultimate legal conclusion that Mr. Sturman was the true and sole inventor of the invention claimed in the '901 patent. Because Mr. Sturman did not present clear and convincing evidence that he conceived of the idea for a three-way integrated spool valve in his presentation, there is insufficient corroborating evidence proving that Mr. Sturman was the sole inventor of the '901 patent.[7]

III. CONCLUSION

For the reasons stated above, we:

(A) REVERSE the district court's decision to allow Juror No. 3 to sit on the jury, and therefore VACATE the

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[7] As Caterpillar points out, Mr. Sturman only sought to have himself declared the sole inventor. We therefore decline to address whether he might be a joint inventor.

jury's verdict and resultant remedies and REMAND for a new trial on the state common law and statutory claims (rendering moot Sturman's issues regarding the denial of JMOL in favor of Sturman, assignment of the '329 and '987 patents to Caterpillar, and exclusion of DX410 from evidence);

(B) REVERSE the grant of summary judgment in favor of Caterpillar on Sturman's fraudulent-inducement counterclaim;

(C) AFFIRM the decision that Mr. Sturman is the sole inventor of the '329 and '987 patents; and

(D) REVERSE the decision naming Mr. Sturman the sole inventor of the '901 patent.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CATERPILLAR INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 99-1201
	)	
STURMAN INDUSTRIES, INC., ODED E. STURMAN and CAROL K. STURMAN,	)	
	)	
Defendants.	)	
	)	
STURMAN INDUSTRIES, INC., and ODED E. STURMAN,	)	
	)	
Counter-Plaintiffs,	)	
	)	
v.	)	
	)	
CATERPILLAR INC.,	)	
	)	
Counter-Defendant.	)	

ORDER

Before the Court is Defendant/Counter-Plaintiffs Sturmans' Motion for a New Trial Pursuant to Rule 59 of the Federal Rules of Civil Procedure [Doc. #348]. After reviewing the voluminous pleadings as well as the extensive accompanying exhibits, the Court denies this motion for the reasons that follow.

Sturman has advanced five different grounds for its motion under Fed.R.Civ.P. 59(a): (1) the Court committed a reversible error in failing to strike Juror 3 for cause; (2) the Court improperly excluded Exhibit 410 and the '901 patent from the jury trial; (3) the PTO's initial interference memorandum qualifies as newly discovered evidence to force a new trial; (4) the Court improperly limited the admission of the '777 patent; and (5) various other procedural errors. The Court will discuss each issue in turn.

LEGAL STANDARD

Federal Rule of Civil Procedure 59(a) authorizes the Court to grant a new trial at the request of a party in both jury and court settings "for any of the reasons for which new trials [or rehearings] have heretofore been granted in actions at law [or in suits in equity] in the courts of the United States." Irrespective of whether a federal court is exercising federal question or diversity jurisdiction, its standard or review must be based on federal law. Jackson v. Bunge Corp., 40 F.3d 239, 244 (7th Cir. 1994); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1196 (7th Cir. 1992).

Under federal law, a motion for a new trial is addressed to the sound discretion of the trial judge. Fort Howard Paper Co. v. Standard Havens, Inc., 901 F.2d 1373, 1377 (7th Cir. 1990). The Seventh Circuit has recognized that a new trial may be granted in three instances: "(1) the verdict was against the clear weight of the evidence; (2) the damages are excessive; or (3) the trial was unfair to the moving party." Allison, 979 F.2d at 1196; Cygnar v. City of Chicago, 865 F.2d 827, 835 (7th Cir. 1989); accord Thomas v. United States, 41 F.3d 1109, 1120 (7th Cir. 1994); Brandt v. Vulcan, Inc., 30 F.2d 752, 758 (7th Cir. 1994); Sokol Crystal Prods., Inc. v. DSC Comms. Corp., 15 F.3d 1427, 1432 (7th Cir. 1994). A Rule 59(a) motion "is not merely intended to secure a forum for the relitigation of old matters

or to afford the parties the opportunity to present the case under new theories; instead, the motion is a device properly used to correct manifest errors of law or fact or to present newly discovered evidence." Fort Howard, 901 F.2d at 1380 n.4. The Seventh Circuit has articulated the legal standard for addressing a new trial motion as follows:

> "In reviewing a motion for a new trial, we view the evidence in the light most favorable to the prevailing party. We will not set aside the jury's verdict if there is a reasonable basis in the record which supports that verdict."

Thomas, 41 F.3d at 1120 (quoting Allison, 979 F.2d at 1196). The trial court is not permitted to substitute its judgment for that of the jury on disputed issues of fact. Hibma v. Odegaard, 769 F.2d 1147, 1154 (7th Cir. 1985). Under Rule 59(b), "[a] motion for a new trial shall be served not later than 10 days after the entry of the judgment." A district court may not extend the time for filing a new trial motion. Varhol v. National R.R. Passenger Corp., 909 F.2d 1557, 1561 (7th Cir. 1990). Within that same time frame Rule 59(d) specifies that "the court may order a new trial for any reason for which it might have granted a new trial on motion of a party." Finally, Rule 59(b) states that a new trial motion "may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative."

DISCUSSION

I. THE STURMANS' ALLEGATIONS OF JUROR BIAS

The Sturmans' claims of juror bias focus around the individual identified as Juror 3.[1] The Sturmans believe that Juror 3's presence in the petit jury "infected" the trial proceedings due to her alleged bias toward Caterpillar. Their claim of "bias" is due to the fact that her husband is an employee of Caterpillar, although she is not. The Sturmans contend that Juror 3 has the sort of impermissable financial ties to Caterpillar that warranted her removal from the jury pool despite her statements that she could serve fairly and impartially. (Id. 118:13-18). Before the Court addresses the issue of bias, there is a valid question of whether or not the Sturmans waived their right to this argument.

After the initial questioning of the jury pool, the Sturmans challenged for cause all current and former Caterpillar employees as well as their immediate relatives. After considering the issue in Chambers, the Court agreed to the removal of all prospective witnesses who were current and former Caterpillar employees from the jury pool. (Id. 179:1-23, 181:2-8). Thereafter, the Court proceeded to consider individual challenges for cause. During these proceedings, the Sturmans raised challenges to five

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[1] There is some confusion over the exact identity of "Juror 3." As Caterpillar correctly points out, Ms. Ida Dungey was the third juror seated. (6/17/02 Initial Trial Tr. 200:21-201:8). Ms. Dungey does not have any ties to Caterpillar. It seems, rather, that the Sturmans are referring to Ms. Diana Adams-Trantham who filled out Juror Questionnaire No. 3. Ms. Adams-Trantham's spouse is a union employee of Caterpillar. It therefore seems that Ms. Adams-Trantham and not Ms. Dungey is the subject of the Sturmans' complaints. In the context of this Order, the Court means Ms. Adams-Trantham whenever it refers to "Juror 3."

prospective jurors, none of whom was Juror 3. (Id. 187-88, 191, 196:16-197). Nor did the Sturmans exercise any of their peremptory challenges against Juror 3 after the Court ruled on their challenges for cause. It therefore follows that the Sturmans cannot now, at this last stage, challenge the propriety of Juror 3 after accepting her at the close of the jury selection, proceedings. See Frazier v. United States, 335 U.S. 497, 513 (1949). As a result of the proceedings and through the questions of their own counsel, the Sturmans were aware of Juror 3's marriage to a Caterpillar employee yet declined to individually challenge her for cause when offered the opportunity by the Court to do so. Accordingly, this matter is waived.

II. EXCLUSION OF DX 410 AND THE '901 PATENT DURING THE JURY TRIAL

The Sturmans believe that the Court improperly excluded the following two exhibits from the presentation: (1) DX 410; and (2) the '901 patent. Had the Court allowed these two exhibits before the jury, the Sturmans allege that the jury would have found in their favor.

A court may grant a new trial on the basis of an error regarding the admission of evidence only in extraordinary situations. Shick v. Illinois Dept. of Human Services, 307 F.3d 605, 611 (7th Cir. 2002). Rule 61 of the Federal Rules of Civil Procedure states that "[n]o error in either the admission of evidence or the exclusion of evidence . . . [is] ground for granting a new trial or for setting aside a verdict or for vacating or modifying, or otherwise disturbing a judgment or order, unless refusal to take such an action appears to the court inconsistent with substantial justice." Seventh Circuit jurisprudence holds that "evidentiary errors satisfy this standard only if a significant chance exists that they affected the outcome of the trial." Hasham v. California State Bd. of Equalization, 200 F.3d 1035, 1048 (7th Cir.

2000). For the purposes of this section, the Court will consider each disputed piece of evidence separately.

A. Exclusion of Exhibit DX 410

DX 410 is an internal Caterpillar evaluation of the '329 patent conducted by one of Caterpillar's engineers, Matthew Touvelle ("Touvelle"), dated March 14, 1996. At the end of the jury trial, the jury found Sturman liable on Caterpillar's claims of trade secret misappropriation, conversion, and breach of contract under sections 5, 6.1, and 7 of the Joint Development Agreement ("JDA"). In this evaluation, Touvelle stated in one of his conclusions that the performance of the integrated dual solenoid spool valve embodied in the '329 patent did not benefit from the use of SAE 52100 and 4140. (DX 410 p.2d). The Court denied admission of DX 410 into evidence in an Order dated July 16, 2002, pursuant to Rule 403 of the Federal Rules of Evidence. The Court found that there was inadequate foundation laid for admission of DX 410. In this regard, the Court stated its concerns over the lack of testimony regarding the testing methodology and the fact that the evaluation was created several years after the relevant events in this case. Finally, the Court found that the probative value of DX 410 was undermined by statements appearing later in the exhibit that seemed to indicate that the statement that," [t]he dual solenoid spool system does not benefit from the use of latching materials (SAE 52100/SAE 4140)," referred to a comparison between the '329 spool valve and a non-latching valve using springs.

The Sturmans contest once again the Court's evidentiary ruling on DX 410 in, their brief. In their exhaustive pleadings, the Sturmans have extensively detailed their arguments on the relevancy and probative value of DX 410. However, their arguments do not address the primary reason why this court excluded DX 410 at trial, namely, their

failure to lay a proper foundation for the admission of said exhibit. Despite having opportunities during the trial to lay an adequate foundation at trial, the Sturmans did not do so. For example, the Sturmans could have, chosen to call Touvelle to the trial to address the Court's concerns but did not do so. See United States v. Hall, 165 F.3d 1095, 1117 (7th Cir. 1999). Accordingly, the Court denies the Sturmans request for a new trial on Caterpillar's trade secret misappropriation claim, conversion claim and breach of contract claim due to the exclusion of DX 410.

B. Exclusion of the '901 Patent

During the course of the jury trial on Caterpillar's trade secret misappropriation, conversion, and breach of contract claims, the Sturmans attempted to introduce the '901 patent into evidence. The Court excluded the '901 patent under Rule 403. The Sturmans once again contest the exclusion of the '901 patent in the instant motion for a new trial on the grounds that: (1) the exclusion of Dwayne Tharp from the stated list of inventors on the '901 patent evidences insufficient economic value to qualify as a trade secret; (2) Caterpillar's failure to mention residual magnetism in the majority of the '901 patent claims shows that Caterpillar's trade secret lacked economic value; and (3) the '901 patent would have showed that Caterpillar did not consider a 3-way version of the integrated spool valve to be "pursuant" to the JDA. The Sturmans raise these arguments for the first time in this motion.[2] Because the Sturmans failed to raise these objections during trial, they are barred from doing so now in their motion for a new trial. Hahm v. Wisconsin Bell, 983 F.Supp. 807, 811 (N.D.Ill. 1997) ("Evidentiary rulings

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[2] Indeed, a review of the trial transcript shows that the Sturmans raised four different grounds that they felt warranted inclusion of the '901 patent. (June 20, 2002 transcript 16:7-15; 16:17-25; 25:18-26:5; and 36:14-37:19).

cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the court's attention by way of an objection or motion to strike which stated the specific ground of the objection.").

III. STURMANS' ALLEGATIONS OF NEWLY DISCOVERED EVIDENCE

As stated supra, Rule 59(a) contains a provision allowing for a new trial on the basis of "newly discovered evidence." In evaluating a Rule 59(a) motion for a new trial on the basis of newly discovered evidence, the following prerequisites must be met: (1) the evidence existed at the time of trial or pertains to facts that existed at the time of trial; (2) the evidence was discovered following trial; (3) the party presenting the new evidence exercised due diligence in discovering the evidence; (4) the evidence is admissible; (5) the evidence is credible; (6) the evidence is material; (7) the evidence is not merely cumulative or impeaching; and (8) the new evidence is likely to change the outcome. Treadwell v. Kennedy, 948 F.3d 1292, 1991 WL 255609 *4 (7th Cir. (Ill.) (unpublished opinion) (citing Mumford v. Bowen, 814 F.2d 328, 330 (7th Cir. 1986)).

The Sturmans have come forth with what they believe is "newly discovered evidence" sufficient to force a new trial, namely -- the initial interference memorandum by the PTO in the '901 patent interference action. In this memorandum, the PTO examiner stated that:

> Claims 6 and 13 of Patent No. 5,479,901 to Gibson et al cover the same invention as count 1 except for the statement that the valve element remains latched in the first and second positions by residual magnetism after the electromagnetic devices are deenergized. This is known in the art as a latching function.

> Use of magnetic hysteresis to perform this latching function is well known in the art of electromagnetic devices and describes residual magnetic qualities present in an electromagnetic device subsequent to the removal of the current applied to the device. (See column 4, lines 6-22 of Sturman patent #3,743,898, copy attached). *In view of the '898 patent it would be obvious to one of ordinary skill in the art use [of] magnetic heysteris to maintain the valve element of count 1 in a position after the electromagnetic devices are deenergized. Accordingly, claims 6 and 13 correspond to count 1.*

(PTO interference Initial Memorandum p. 11-12) (emphasis added). A similar statement to this effect is also on page 8 of the memorandum.

The Sturmans conclude from the above statements that the initial interference memorandum constitutes conclusive proof by an objective expert in the field of patent law that Caterpillar's trade secret -- workable magnetic latching in the fuel injector valve in the absence of permanent magnets via the use of a housing and armature made of a material with sufficient residual magnetism -- does not constitute a trade secret. As a result, the Sturmans believe that this evidence, had it been available at trial, would have produced a markedly different jury verdict in their favor on Caterpillar's claims of trade secret misappropriation, conversion, and breach of contract. As the Sturmans point out, § 2(d)(1) of the Illinois Trade Secret Act limits trade secret protection to information that "is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use." The Sturmans conclude that the PTO examiner's statements regarding the

obviousness of Caterpillar's trade secret apply when evaluating its economic value as a trade secret under the Illinois act. However, the Court has several concerns regarding this document that preclude it from ordering a new trial.

As the face of the document states, this is not a final determination by the PTO on the issue of patent interference but a preliminary statement. As Caterpillar notes, this preliminary statement is still subject to challenges by the parties as well as review by an Administrative Patent Judge and then a final hearing before the entire Board of Patent Appeals and Interferences. See e.g., 37 C.F.R. §§ 1.633, 1.641, 1.655, and 1.658. The Notice of Interference to which the memorandum is attached moreover states that the opinion is not binding precedent. (Notice of Interference at 1). Given the foregoing status of the memorandum, it is unlikely that the Court would have allowed entry of it into the record during trial under Rule 403 of the Federal Rules of Evidence as there is a substantial likelihood that admission of the memorandum would have unfairly prejudiced or confused the jury. Further undermining its probative value is the tenuous linkage between the standards governing determination of obviousness in a patent law context and what constitutes an economically viable trade secret under the Illinois Trade Secret Act. Accordingly, the Court finds no reason to order a new trial on this ground.

IV. THE STURMANS' CLAIMS REGARDING THE USE OF THE '777 PATENT AT TRIAL

The Sturmans also believe that the Court's evidentiary rulings on their use of Caterpillar's '777 patent justify the grant of a new trial on certain aspects of this case. The Sturmans have specifically identified three instances where they believe the Court erred: (1) when the Court

denied the Sturmans the opportunity to use the '777 patent to impeach Caterpillar's magnetics expert; (2) when the Court denied the Sturmans the opportunity to present to the jury the '777 patent for the purposes of showing disclosure of Caterpillar's trade secret during the trade secret misappropriation liability phase of the trial; and (3) when the Court denied use of the disclosure of the '777 patent on the issue of damages for Caterpillar's trade secret.

Turning first to the issue of impeachment, Caterpillar produced their magnetics expert, Dr. Jiles who testified during his direct examination that Sturmans' prior patent disclosed the use of residual magnetic latching limited to materials having a coercivity under 20 Oersteds. (See 6/27/02 Transcript 59:18-22). A later controversy arose over his definition of "soft magnetic materials," which Dr. Jiles defined as materials other than permanent magnets. (See id. 73:10-3). While Dr. Jiles indicated that he was aware of other definitions of "soft magnetic materials," he offered his expert opinion that these definitions were incorrect. (See id. 73:15). It was at this juncture that the Sturmans attempted to introduce the '777 patent for the stated purpose of impeaching Dr. Jiles. The '777 patent, owned by Caterpillar, contained a definition of "soft magnetic materials" at odds with Dr. Jiles. The Court denied admission of this exhibit after expressing concerns that it was beyond the scope of direct, (see id. 74:22-75:14), that Dr. Jiles had never seen it before (see id. 73:2-16; 74:17-21; 75:15-16; 76:11-12; 77:15-19), and that it did not constitute a prior inconsistent statement by Dr. Jiles. (See id. 80:11-12).

The Court finds that there is an insufficient basis to conclude that it erred in denying the use of the '777 patent to impeach Dr. Jiles under the preceding circumstances. Nor does the Court find that the Sturmans' speculations on the ramifications of the Court's evidentiary decision show "a

significant chance exists that they affected the outcome of the trial." Hasham, 200 F.3d at 1048.

Later on during the trial, the Sturmans presented the '777 patent as an admission by Caterpillar that any soft magnetic material can be used to accomplish workable latching in a fuel injector. (July 9, 2002, Initial Trial Tr. 86:17-87:6). In two written Orders, the Court entered into evidence a passage from the patent as admission by Caterpillar that soft magnetic materials could be used in making the core, armature, and valve body to achieve magnetic latching in a non-fuel injector environment. (July 12, 2002, Order p. 4). However, the Court denied full admission of the '777 patent finding that there was insufficient foundation that Caterpillar knew or believed the invention disclosed in the '777 would work in a fuel injector environment. (See July 16, 2002, Order p.4). The Sturmans have offered nothing new in their motion for a new trial to make the Court reconsider its prior evidentiary rulings in this matter. Accordingly, the Court does not find any need to order a new trial on this ground.

V. STURMANS' MISCELLANEOUS CLAIMS

The Court does not consider any of the other arguments advanced by the Sturmans to be sufficient to warrant a new trial. The Sturmans state the following list of what it believes to be procedural errors justifying a new trial: (1) improper inclusion of testimony on exemplary damages; (2) improper exclusion and sequencing of jury instructions; and (3) attorney-client waiver. The Court has already addressed two of these issues on numerous previous occasions and finds no reason to change its earlier rulings. Therefore, the Court will address only the jury instruction issue.

The Sturmans take issue with the Court's exclusion of its prior knowledge question and the relegation of the special interrogatory to the end of the jury verdict forms, claiming that these rulings were in error. Jury instructions are reviewed only to determine whether the "instructions as a whole were sufficient to inform the jury correctly of the applicable law." Patel v. Gayes, 984 F.2d 214, 218-19 (7th Cir. 1993) (quoting United States v. Vallarreal, 977 F.2d 1077, 1079 (7th Cir. 1992) cert. denied, 113 S.Ct. 1350, 122 L.Ed.2d 731 (1993)). A reversal is warranted only if the Sturmans can show that the instructions misguided the jury so much that they were prejudiced. Goldman v. Fadell, 844 F.2d 1297, 1302 (7th Cir. 1988). This circuit utilizes a two prong analysis. First, the Court determines whether the instruction misstates or insufficiently states the law. Doe v. Burnham, 6 F.3d 476, 479 (7th Cir. 1993). If so, the next inquiry is whether the misstatement or deficiency likely confused or misled the jury causing prejudice to the Sturmans. Id.

The Court held that inclusion of the Sturmans' proposed prior knowledge instruction would be confusing and duplicative as well as raising the risks of an inconsistent verdict. The Sturmans have not carried their burden to show that its omission misstated or insufficiently stated the law. Even assuming *arguendo* that they had, the Sturmans cannot show prejudice due to the existence of the special interrogatory, showing that the jury considered the issue the Sturmans wanted considered. Accordingly, there are no grounds to grant a new trial on the issue of jury instructions.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant/Counter-Plaintiffs Sturmans; Motion for a New Trial Pursuant to Rule 59 of the Federal Rules of Civil Procedure [Doc. #348] is DENIED.

ENTERED this 30th day of May, 2003

/s/Joe B. McDade
JOE BILLY McDADE
Chief United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1444, -1490

CATERPILLAR INC.,

Plaintiff-Cross Appellant,

v.

STURMAN INDUSTRIES, INC.,
ODED E. STURMAN, and CAROL K. STURMAN,

Defendants-Appellants.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the CROSS-APPELLANT, and a response thereto having been invited by the court and filed by the APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on January 14, 2005.

FOR THE COURT,

/s/Jan Horbaly (AV)
Jan Horbaly
Clerk

Dated: January 7, 2005

CATERPILLAR V STURMAN INDUSTRIES,
03-1444, -1490
(DCT - 99-CV-1201)

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1444, -1490

CATERPILLAR INC.,

Plaintiff-Cross Appellant,

v.

STURMAN INDUSTRIES, INC.,
ODED E. STURMAN, and CAROL K. STURMAN,

Defendants-Appellants.

JUDGMENT

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT COURT OF ILLINOIS

CASE NO.: 99-CV-1201

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

(A) REVERSE the district court's decision to allow Juror No. 3 to sit on the jury, and therefore VACATE

the jury's verdict and resultant remedies and REMAND for a new trial on the state common law and statutory claims (rendering moot Sturman's issues regarding the denial of JMOL in favor of Sturman, assignment of the '329 and '987 patents to Caterpillar, and exclusion of DX410 from evidence);

(B) REVERSE the grant of summary judgment in favor of Caterpillar on Sturman's fraudulent-inducement counterclaim;

(C) AFFIRM the decision that Mr. Sturman, is the sole inventor of the '329 and '987 patents; and

(D) REVERSE the decision naming Mr. Sturman the sole inventor of the '901 patent.

ENTERED BY ORDER
OF THE COURT

DATED October 29, 2004 /s/
Jan Horbaly, Clerk

ISSUED AS A MANDATE: January 14, 2005

APPENDIX E

[T. Tr. Pages 35-43, 48-202]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

CATERPILLAR INC.,	)	Civil Docket
	)	No. 99-1201
Plaintiff,	)	
	)	
vs.	)	Peoria, Illinois
	)	June 17, 2002
STURMAN INDUSTRIES, INC.,	)	
ODED E., STURMAN and	)	
CAROL K. STURMAN,	)	
	)	
Defendants.	)	

JURY TRIAL
BEFORE THE HONORABLE JOE B. McDADE
CHIEF JUDGE

[Beginning Page 35]

THE COURT: Okay. I don't have anything else. My thought is to have ten jurors. So you each will have –

MR. STREFF [Counsel for Sturman]: Your Honor, before you make a pronouncement there, let me tread with some fear and trepidation into the fact that with three defendants, including individuals -- including individuals that have their own considerations here, we would respectfully submit to the Court that we should have at least six.

THE COURT: What are the individual considerations?

MR. STREFF: Mr. Sturman and Mrs. Sturman. There will be reactions to them, we believe, by some jurors which require us to take peremptory challenges -- I'm sorry, require us to exercise peremptory challenges having to do with both their origin, some of the counties that exist down here, and the proclivities that some of those folks have with respect to people like Mr. Sturman and Mrs. Sturman.

THE COURT: Do they have accents?

MR. STREFF: Yes. At least one of the two of them does.

MR. ABRAMS [Counsel for Caterpillar]: Are we -- I'm confused. Are we talking about the number of jurors?

THE COURT: No, peremptory challenges.

MR. ABRAMS: Oh.

THE COURT: And he wants more than three, he wants six, because we have three defendants. And he's also suggesting that the Sturmans individually would like to explore the issue of some type of nationality prejudice in terms of they're Germans, foreigners, and they want to be able to have a peremptory or two on those type issues. I was going to give you more than three anyway. I hadn't really thought of six, but do you have any objection?

MR. ABRAMS: I don't have an objection.

THE COURT: So you can have six.

MR. STREFF: Thank you, Your Honor.

MR. ABRAMS: I assume we get six too.

THE COURT: No, you only get three. You only get three.

MR. STREFF: You did hear that.

MR. ABRAMS: We only get three?

THE COURT: How many do you want?

MR. ABRAMS: I want six too if he has six.

THE COURT: You want six?

MR. ABRAMS: No -- I want the total of six, yes.

THE COURT: And you think that's fair?

MR. STREFF: No, I don't, Your Honor. We're sitting down in his hometown. His client's world headquarters is two blocks away. We're going to be running into issues -- I didn't get a chance to get through the jury binder since we were called in here, but there will be significant need to understand those companies -- I'm sorry, those families that have bread put on the table by reason of Caterpillar. And your -- the reason I raise the issue, your normal practice, as I understood it, was three each side. We believe in this context, given the fact that Caterpillar chose to sue not one but two individuals, that we should have more.

MR. ABRAMS: May I be heard, Your Honor?

THE COURT: Yes.

MR. ABRAMS: Your Honor knows, probably better than anyone, that Caterpillar here in Peoria has prejudice against it by a number of people for a lot of reasons. So there is a significant population here in Peoria, in this area of this court, that has an animus against Caterpillar. We know that from lots of cases and lots of study. To the extent there's animus directed to the Sturmans because they have an accent, I would respectfully say there's an equal animus by a percentage of the population here to Caterpillar, and I think it only fair to have an equal number of peremptory challenges.

THE COURT: Well, the starting point is the rule. Which I think says that when there's more than one party, the

Court can give additional peremptories. Let's see. What rule is that? What's the rule, Mr. Streff?

MR. STREFF: You got me, Judge. I don't have that one memorized.

THE COURT: Okay. Let's see here. Michelle, do you know the rule number?

THE LAW CLERK: No, Judge.

THE COURT: I've got the thing here, it's just a matter of finding it. The Court shall allow the number -- in civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges or the Court may allow additional peremptory challenges permitted to be exercised separately or jointly. So, first of all, we start off with three. Whether you're Caterpillar, John Deere or Joe Blow, you got three. If there are more than one plaintiff, I can give additional and have them be exercised separately or jointly. So in this case, you keep your three. I'm reducing you to five. Five jointly.

MR. STREFF: Yes, Your Honor.

THE COURT: I think with three defendants and this issue, which I'll give them a couple extra ones, but you're stuck with your three. I will voir dire the entire panel, probably. I think we've got about 35.

THE LAW CLERK: Yes. Well, that's how many we called in.

THE COURT: We called in. Well, may be less. And then during that course, if there's any obvious for cause I will get rid of them. When I'm done, I will allow each side ten minutes to voir dire the panel, and then we will select the jury by striking at the sidebar. Alternating strikes, no back-striking, which means your first strike is the No. 5 juror, you've accepted the first four for all times. Alternate,

Plaintiff will strike, Defendant will strike two, the first go round. The second round the Plaintiff will strike one, the Defendant again will strike two. So after the second round, Plaintiff will use up two peremptories, Defendant used up four, and you each have one left. The Plaintiff will strike his third peremptory and the Defendant will strike its third. And we've used up five and three.

MR. STREFF: (Nodded head up and down.)

MR. ABRAMS: May I just go over that –

MR. ABRAMS: -- so I understand it?

THE COURT: Yes.

MR. ABRAMS: We being the Plaintiff, we strike first.

THE COURT: Right.

MR. ABRAMS: Mr. Streff strikes –

THE COURT: Two.

MR. ABRAMS: -- two, and he accepts up to that point, whatever is –

THE COURT: He may decide to strike No. 1.

MR. ABRAMS: Right. And No. 2.

THE COURT: And No. 2.

MR. ABRAMS: And then we're back to me. I struck No. 5, on your example, so now we're -- we're out 1 and 2; I can't go to 3 and 4 because I passed them.

THE COURT: Right.

MR. ABRAMS: So I start with 6, 7. Let's assume I strike 8, No. 8.

THE COURT: Yes, yes.

MR. ABRAMS: Okay. And then we're back to Mr. Streff striking two.

THE COURT: Starting from the last one he struck.

MR. ABRAMS: Right.

MR. STREFF: So I can strike 3 and 4 if I want.

THE COURT: He can strike 3 and 4 if he wanted.

MR. STREFF: But if I started with 2 and 3, I couldn't go back to them.

THE COURT: Right.

MR. ABRAMS: Okay. Thank you.

THE COURT: Okay. And you will receive a list of the jurors as –

THE LAW CLERK: Seated.

THE COURT: -- as seated in the jury box, with the first one being closest to the railing in the back row and then No. 7 the end closest to me. Then No. 8 will be on the first row closest to the railing, and No. 14 would be closest to me in the first row. And I don't know if she's got chairs in front of the jury box or not. If –

THE LAW CLERK: Yes, she does.

THE COURT: If she does, then No. 15 would be first chair closest to the railing and No. would be closest to me in the first row.

MR. ABRAMS: Okay.

THE COURT: Then No. 22 would be the first seat bench in front of the railing closest to the wall.

MR. ABRAMS: And can I ask a question?

THE COURT: Yes.

MR. ABRAMS: That's what I understood from, I think, Michelle last week. We got the notebook --

THE COURT: Uh-huh.

MR. ABRAMS: -- of questionnaires, which at the bottom of, labeled first one, is juror 3.

THE COURT: Right. So you're going to have to fumble through it like I do. What I'll do is I'll say Juror No. 55, and I'll be turning to No. 55 in the jury book. So you got to flip some pages.

MR. ABRAMS: Right. But when he goes into his seat, he's not No. 55, he is whatever that seat is.

THE LAW CLERK: Right.

THE COURT: Right.

MR. ABRAMS: Got you.

THE COURT: But then when we start asking questions about his questionnaire, I'm using the -- his number in the questionnaire book.

MR. ABRAMS: Okay.

THE COURT: And on your sheet it will have his seat, No. 5, and also have his juror number.

MR. ABRAMS: Oh, it will have his seat number too?

THE COURT: Yes. And it will have his seat number and his number in the jury books. In the juror books.

MR. ABRAMS: I didn't see that. That's why I was confused.

MR. STREFF: Because you haven't received it yet.

MR. ABRAMS: Oh.

MR. STREFF: We get that when they're seated.

THE COURT: That's right, he's been here before. You will get that when you go back out there, uh-huh. Okay. Any other questions?

MR. STREFF: I'm sure I've forgotten something, Judge, but we'll be spending time together; I am sure we can raise it.

MR. ABRAMS: I'm sure I have, too.

THE COURT: I know. About ten minutes, okay?

MR. ABRAMS: Surely.

THE COURT: I need ten minutes to get myself together.

MR. STREFF: We can use the time beneficially, Your Honor.

[Beginning Page 48]

THE CLERK: The jurors are here. Judge, are you ready for the jurors?

THE COURT: All right.

THE CLERK: Juror No. 19, Larry Crouch. Juror No. 57, Charles Pierman. Juror No. 46, Melissa Cozad. Juror No. 13, Jerri Barron. Juror No. 61, Robert Brown. Mr. Brown? Robert Brown.

MR. BROWN: Okay. I got lost in the --

THE CLERK: That's okay. Juror No. 79, Gerilyn Kegley. And Juror No. 6, Brenda Rosiak. Donald Clark, No. 80. Sandra Silldorff, No. 72. Warren Stovall, No. 48. Rose Humphrey, No. 26. Gary Craig, No. 22. Ida Dungey, No. 52. And John DeJaynes, No. 78.

Ma'am, if you'll have a chair in the front, starting this end. Deborah Campbell, No. 63. Charles Ulbricht, No. 65. Tim Miller, No. 69. Diana Adams-Trantham, No. 3. Hester

McCosh, No. 5. Megan Wood, No. 47. And Terri Hinthorn, No. 49.

Ma'am, if you'll have a seat on the front pew, starting at the end. Connie Scott, No. 62. Orville Raitt, No. 75. Nanette Clauson, No. 81. Sandra Fowler, No. 31. And Patrick Fitzanko, No. 10.

Ma'am, hold on -- okay. Front row here, please. Cheryl Fischer, No. 44. Candace Yeater, No. 64. Linda Marlowe, 17. Janet Webster No. 9. Adam Passini, No. 55.

Sir, in the next row. Kurt Hobart, No. 82. Maurice Jones, No. 33. Lori Lawless, No. 15. Richard Wagers, No. 39. And Gregory -- Geoffrey Hickman, sorry, No. 67.

Sir, in the following row. Owen Smith, No. 83. Ronald Alexander, No. 25. And Andrew Vlachos, No. 42.

THE COURT: Oh, please be seated. Would the Clerk please swear in the panel.

THE CLERK: Please raise your right hand.

(Jury panel sworn.)

THE CLERK: Thank you.

THE COURT: Good morning to all of you. I'm Judge McDade, and you are here today in connection with a case set for jury trial. From your number, I will select a jury of ten. That's an unusual number, I suspect, to you because you usually associate twelve with a jury. In federal court, we can now have civil juries of less than twelve. Unlike a criminal case, where we still have to have twelve jurors. But in a civil case, we can have any number of jurors, at least six to twelve. The assumption is that it's less costly and there's no significant difference between decision making by a six-man, seven-, eight-, nine-, ten- or 12-person jury. So we normally have a jury in civil cases from six to eight members.

In this case, we're going to have ten jurors because I suspect -- the case is scheduled for three weeks, and it may even go into a fourth week, so we're talking about a long period of time, so there's greater risk that there may be a need for a substitute. And by substitute I mean anywhere down to six. We got to have six. So we start with ten, and if someone is disabled from continuing, we still got nine. And so far down to six.

I suspect there are about, what, 35 here?

THE CLERK: 38.

THE COURT: 38. Well, why so many, Judge McDade, if you're only going to use ten? Well, some of you may not be qualified to serve on this jury. What I mean by qualifications, I don't mean legal qualifications. I mean you may not have the frame of mind to be fair and impartial to both sides. Because of experiences, baggage, that you carry along with us, you may not be an appropriate jury member for this particular case. And it also involves Caterpillar as one of the parties. And a lot of people in this area have connections with Caterpillar, and sometimes those connections are such that it may make you inappropriate. So bear with me as we try to select ten.

And all of you have the legal qualifications to serve on this jury. But as I mentioned, all of you have had experiences in your life, and based on those experiences you have formed attitudes, biases, prejudices, feelings or beliefs that may affect your ability to be fair and impartial in any particular case. And what we want to do, we want to select ten persons who, as much as humanly possible, are impartial. And can give both sides a fair trial. Because when we leave this courtroom at the end of the case, justice will be done if we have had an impartial jury that has decided the issues. That's the most anyone can expect. And when that happens, we have done our job. And you, the jury, is the most important factor in that job.

So what we are about to do we call voir dire. Which is jury selection. I'm told that means to tell the truth. Because as we try to ascertain whether or not you can be fair and impartial, the only way we have to make that determination is from asking you questions and considering your answers. And I expect you to answer truthfully, because that's the way the system works. If ever you are in a trial as a party, you will want a fair and impartial jury to decide your case. That's what these parties are entitled to. So I will be asking you some questions, and the question has some bearing on your ability to be fair and impartial, I hope. Some of the questions may seem personal, but that's not the intent, because we don't want to pry into your life, but we do want to ask questions that will elicit information that will reveal whether or not you do have some bias or prejudice or some predisposition to decide this case otherwise than in an impartial manner. So--. And it may be that I don't ask and the lawyers don't ask the important question that will reveal something. Well, I expect you to volunteer it. I expect you, in the spirit of things, to -- to let me know that there's something about this case, something about the parties, that causes you to doubt whether or not you can be fair and impartial.

Now, I mentioned that we're talking about at least a three- week trial. And by weeks, it's really a four-day week, because I work Monday through Friday and then -- Monday through Thursday, and then Friday I usually reserve to take care of some other matters. Because I still have 250 cases on my docket to try, so I have to do other work too. And we usually start at 9:00, work till 5:00, 5:30, with an hour usually for lunch, and two breaks mid morning, mid afternoon. And, of course, we'll have to do something about the 4th of July, if we go over that far, and we will make arrangements. I, certainly, and the parties, I know, would want you to have the benefit of that holiday, so that may extend the length of the trial too, but we'll get through it.

That's going to be our job. But because there is some length here, it may create a hardship for some- body. And the law recognizes that there may be employment situations, family circumstances, that really would create a hardship if you had to serve on this jury for that length of time. So if there are any of you who feel that to serve on this jury for that length of time would be a severe hardship and you want to try to get out, I will have you come up to the side, where you can have a private chat with me and the lawyers, and I will decide whether or not to release you. We do it privately so no one will hear, because I discovered that if you don't, you might have a run on the bank, so to speak. If everyone knows that if you say this, you can get out, then suddenly everybody has a sick uncle. So we know your tricks. So if there's any of you who do believe that to serve on this jury for that length of time would be a severe hardship, raise your hand and we'll call you up one by one--. Not yet. I'm going to watch you; you're eager. We'll call you up one by one and hear what you have to say.

Now, I've got to explain this technology. We're supposed to have the latest in technology. We're supposed to put on a sound, and then you can't hear what we say. That works, but the court reporter has a problem with that, hearing when the sound is up that high, so the last time I had a trial, we had to have the Clerk hold the microphone up. And with all this technology, it didn't look very good. I don't know what's going to happen here, so just bear -- I hope it works this time.

(The following sidebar conference was held out of the hearing of the jury panel.)

THE COURT: Counsel? You hearing all right, Christy? Oh, okay. Can you hear me? THE JURY PANEL: Yeah.

THE COURT: Can you hear me now? All right. Raise your hand. Mr. DeJaynes? MR. STREFF: Can you get the number, too, Judge?

THE COURT: You're No. 78, Mr. DeJaynes?

MR. DeJAYNES: Right. I have to have surgery on my hand July 1st.

THE COURT: Okay.

MR. DeJAYNES: Just an outpatient surgery, but it's been scheduled for three months because the surgeon is only in some days. That would be my only conflict.

THE COURT: Well, I hope it goes well. You're excused.

MR. DeJAYNES: Just leave, then?

THE COURT: Yes, you can.

THE CLERK: Mr. DeJaynes, you'll need -- you're scheduled July 1st? One more week in July you need to call for. Wednesday, this Wednesday, after the break.

(Whereupon Mr. DeJaynes left the courtroom.)

THE COURT: All right. In the back, Mrs. Barron? Mrs. Cozad? Mrs. Cozad?

MS. COZAD: (Nodded head up and down.)

THE COURT: Okay. Come on. She's No. 46.

MR. STREFF: Thank you, Judge.

MS. COZAD: I can't miss work. I work --

THE COURT: What kind of work do you do?

MS. COZAD: I work in a dental office.

THE COURT: Okay. And you are the --

MS. COZAD: Three weeks would be pushing it.

THE COURT: Would it? You're the receptionist?

MS. COZAD: I work in the front. I do the insurance, I do everything --

THE COURT: Okay.

MS. COZAD: -- for the dental work.

THE COURT: How large is the office?

MS. COZAD: It's not very big. There's about ten of us.

THE COURT: Ten of you?

MS. COZAD: Uh-huh.

THE COURT: What happens when you go on vacation?

MS. COZAD: Well, I've never had one yet. I've been there three years, they don't let me go. I can take one day at a time.

THE COURT: Oh, I see, so you've never given yourself two weeks vacation?

MS. COZAD: No, but I've got this year coming, I have got a grand-baby on the way.

THE COURT: But you felt in the past you couldn't have a vacation because you can't take off for two weeks?

MS. COZAD: No, I don't think they would get rid of me, but I think three weeks would be pushing it.

THE COURT: You do?

MS. COZAD: If it was shorter, I probably could slide by.

THE COURT: Okay. Do you think your job would be in jeopardy?

MS. COZAD: Actually, no, I don't think they'd fire me. They might give me a lot of static about it.

THE COURT: You're just saying you don't think you want to be away three weeks. Is that what you're saying?

MS. COZAD: Oh, no, I don't think they would like it, working for two doctors. It's probably pushing my limit.

THE COURT: Are you the -- is your husband working too?

MS. COZAD: Yes.

THE COURT: Okay.

MS. COZAD: He's a firefighter.

THE COURT: Okay.

MS. COZAD: But I don't know about three weeks. That's the only thing that --

THE COURT: What do you gentlemen think?

MS. COZAD: If I have to --

MR. ABRAMS: I certainly don't want to impose on a juror if it's a problem for her.

MR. STREFF: I agree, Your Honor. If she's the one that does all the insurance coverage, for three weeks they don't get any bills out, insurance, that's three weeks of no revenue.

THE COURT: All right.

MR. STREFF: It would be pretty tough.

THE COURT: All right. I will excuse you.

MS. COZAD: Do I go back and sit?

THE COURT: No, you can leave. She has to call back Wednesday now?

THE CLERK: Wednesday after 3:00.

MS. COZAD: Thank you very much.

(Whereupon Ms. Cozad left the courtroom.)

MR. STREFF: You might tell the rest of the jurors that leaving this time means they have to call back so they don't think this is a --

THE COURT: Oh, yes.

MR. STREFF: We will get fewer people at the microphone.

THE COURT: Yes, sir. Mr. Pierman.

(To the Jury Panel): I might mention to you that if you are excused from this jury, you got to call back Monday for whether or not you will get on the jury for next week, so you're not off the hook completely if you're excused.

No. 57.

MR. PIERMAN: If it's three weeks, I can only serve through the 3rd. I have a prepaid family vacation.

THE COURT: Okay. Where are you going to go?

MR. PIERMAN: Canada.

THE COURT: Ah. Okay. And that's scheduled for around July 3rd?

MR. PIERMAN: July 5th, I believe.

THE COURT: July 5th. Okay. Well, I can't promise we'll be done, so I will excuse you. You got to call back Wednesday.

(Whereupon Mr. Pierman left the courtroom.)

THE COURT: Anyone else? Oh, yes, Mr. Clark.

MR. CLARK: My wife is going into the hospital tomorrow, which this just came up about last Wednesday or Thursday, so --

THE COURT: What's she going in for?

MR. CLARK: Well, she's going to have a stress test, and I think she has some heart blockage.

THE COURT: I hope it's not that bad --

MR. CLARK: I do too.

THE COURT: -- but you're excused. You should be with her.

MR. CLARK: Thank you.

THE COURT: But call back Wednesday.

MR. CLARK: Wednesday?

THE COURT: Yes.

MR. CLARK: Thank you.

(Whereupon Mr. Clark left the courtroom.)

THE COURT: He was No. 80. Did you get that?

MR. STREFF: Yes, I did, thank you.

THE COURT: Any more hands? Okay. Is that Mrs. Clauson? No. Mrs. Fowler? Yes. No. 31.

MS. FOWLER: My mother is in a nursing home in Galesburg, and a week ago she took very will. And I have power of attorney for her, and I just feel I need to be there for her.

THE COURT: Well, I think you should too, because if she's taken a turn for the worse, you never know. So you are excused. But call back Wednesday.

MS. FOWLER: All right. Thank you.

THE COURT: Mr. Passini.

MR. STREFF: What number, Judge?

THE COURT: No. 55.

The answer is no.

MR. PASSINI: I probably got two issues. I lost my job with the steel mill in Hennepin, started a new job, so I've

got no vacation to use for these days, so that makes it kind of tough.

THE COURT: It does.

MR. PASSINI: And with Caterpillar being involved with their free trade policy, it kind of leaves a bitter taste in my mouth besides, so --

THE COURT: Well, I understand the plant is going to reopen.

MR. PASSINI: I understand. I hope so.

THE COURT: I was told by somebody last week it was going to reopen.

MR. PASSINI: Well --

THE COURT: I'm sorry about your job.

MR. PASSINI: Well, I have got another job.

THE COURT: Well, stay with your job. Call back Wednesday.

MR. PASSINI: Thank you.

(Whereupon Mr. Passini left the courtroom.)

THE COURT: Anyone else? Okay. Did you all get the numbers that were excused.

MR. STREFF: 78, 46, 57, 80, 31, 55.

THE COURT: Right.

(The following proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Okay. I'm impressed. I mean, three weeks is a long period, and I truly appreciate the willingness of you to make some sacrifice to do your duty by participating in the court system. Serving on a jury affords you an opportunity to be part of the judicial process by which the legal affairs and liberties of your fellow men and women

are determined and protected under our form of government. You are being asked to perform one of the highest duties of citizenship, and that is to sit in judgment on facts which will determine the rights of your fellow citizens. This is not a frequent demand. For instance, raise your hand those of you who served on a federal jury before.

(No response.)

THE COURT: None of you. So, you see, this is nothing that happens frequently. It's relatively infrequent. And when the call is made, I'm glad you stepped up to the plate.

As I mentioned, this is a civil action and not a criminal case that we will be trying. It's a civil action in which money damages are being sought by the party who brings the lawsuit. A lawsuit is commenced by filing in court papers called a complaint. The complaint sets forth the various claims of the Plaintiff. The person who files the complaint is called the Plaintiff. So you have the Plaintiff, the one who brings -- who starts the lawsuit by filing a complaint.

The Plaintiff in this case is Caterpillar, Inc. Caterpillar is represented by its lead attorney, Mr. Robert Abrams, and I'm going to have Mr. Abrams introduce himself to you and to his co-counsel, and also a corporate representative of Caterpillar, Inc. Mr. Abrams.

MR. ABRAMS: Thank you, Your Honor. Good morning, ladies and gentlemen. I want to introduce you to the other people sitting around this table who will help me in representing Caterpillar in the trial of this case. This end is Greg Commins.

MR. COMMINS: Good morning.

MR. ABRAMS: Joel Freed.

MR. FREED: Good morning.

MR. ABRAMS: Tim Bertschy.

MR. BERTSCHY: Good morning, ladies and gentlemen.

MR. ABRAMS: And I have the pleasure now to introduce you to Caterpillar's corporate representative. And, as Judge McDade will tell you, Caterpillar being a corporation has a right to have a representative at trial, and this is Mr. Dale Maley.

MR. MALEY: Good morning.

MR. ABRAMS: Thank you, Your Honor.

THE COURT: Yes. And the other gentleman at the counsel table is there to assist Mr. Abrams in jury selection, and his name is, Mr. Abrams --

MR. ABRAMS: He's George Spechart. I'm sorry, Your Honor.

THE COURT: Very well.

The person or persons against whom a lawsuit is brought is called the Defendant or Defendants. The Defendants in this case are Sturman Industries, which is a corporation, as I understand it, and Oded E. Sturman and his wife, Carol K. Sturman. And their lead attorney is Mr. William Streff, and I will ask Mr. Streff to introduce himself and his clients and his co-counsel.

MR. STREFF: Thank you, Your Honor. It's my pleasure to introduce Mr. Oded Eddie Sturman.

MR. STURMAN: Good morning.

MR. STREFF: And his wife, Carol Sturman.

MRS. STURMAN: Good morning.

MR. STREFF: Mrs. Sturman is also the president of Sturman Industries.

At counsel table I am assisted by Paul Steadman.

MR. STEADMAN: Good morning.

MR. STREFF: Todd Gale.

MR. GALE: Good morning.

MR. STREFF: And David Lubben.

MR. LUBBEN: Good morning.

MR. STREFF: And I also have the able assistance of Mark Varboncouer.

MR. VARBONCOUER: Good morning.

MR. STREFF: Kevin O'Shea.

MR. O'SHEA: Good morning.

MR. STREFF: And Mary Zog.

MS. ZOG: Good morning.

MR. STREFF: Thank you, Your Honor.

THE COURT: Thank you, Mr. Streff.

By the presence of the number of attorneys, you might suspect that this is an important case, and it is, and you are an important jury. So we're all very important. What is the case about? This case involves claims by Caterpillar -- do we have this on the screen?

THE LAW CLERK: Oh, I'm sorry.

THE COURT: This case involves claims by Caterpillar for breach of contract, trade secret misappropriation and conversion against Sturman Industries, and Mr. and Mrs. Sturman. Collectively, we refer to them as the Sturmans. Additionally, both sides have claims against each other that will be decided by the Court, although evidence relating to these claims may be presented during the course of the trial. You are to disregard this evidence to the extent it is not relevant to the issues you are deciding.

Caterpillar will be referred to as the Plaintiff and the Sturmans as -- collectively as the Defendants.

In 1991, Caterpillar entered into a consultant agreement with the Sturmans in connection with Caterpillar's ongoing efforts to develop an electronically controlled actuator for a Caterpillar fuel injector. The work of the parties on the actuator program was done pursuant to a contract known as the Joint Development Agreement, or the JDA. The JDA had provisions for protecting the intellectual property of both Caterpillar and the Sturmans.

In April and June of 1994, Mr. Sturman applied for and obtained two patents, which are known as the '987 and the '329 patents. Caterpillar claims that the conception of the inventions covered by these patents was completed during and pursuant to the joint development program and covered under the JDA.

The technology at issue in this case is workable magnetic latching in a fuel injector valve in the absence of permanent magnets via the use of a housing and armature made of a material having sufficient residual magnetism. Caterpillar claims the work under the joint development program that made the patented inventions complete was the discovery of materials with sufficient residual magnetism for use in a fuel injector environment. Caterpillar also claims that before this effort under the joint development program, the Sturmans had not yet discovered such a workable magnetic material that had sufficient residual magnetism to achieve latching in the absence of permanent magnets in a fuel injector environment.

In response, the Sturmans deny the claims of Caterpillar and contend that Mr. Sturman, prior to his work with Cater- pillar, made or conceived of workable magnetic latching in a fuel injector valve in the absence of permanent magnets via the use of a housing and armature made of a material with sufficient residual magnetism. The Sturmans

further deny that the patented inventions were conceived during or pursuant to the joint development program. Among other things, you the jury will decide these issues.

Caterpillar also claims that under the provisions of the Joint Development Agreement the discovery of the appropriate materials to achieve workable magnetic latching in a fuel injector valve in the absence of permanent magnets via the use of a housing and armature made of a material having sufficient residual magnetism is intellectual property owned by Caterpillar under the terms of the JDA. Caterpillar claims the Sturmans breached the JDA by, one, failing to assign patents disclosing Caterpillar's intellectual property in violation of the assignment provisions of the Joint Development Agreement; two, disclosing proprietary information to third parties in violation of the confidentiality provisions of the Joint Development agreement; third, working with other companies on actuators and/or driver circuits for fuel systems for diesel engines in violation of the exclusivity provisions of the Joint Development Agreement; and four, licensing to third parties intellectual property relating to driver actuators and driver circuits and components thereof. The Sturmans deny this claim. You the jury will decide whether the Sturmans breached the JDA.

Caterpillar also brings claims against the Sturmans under Illinois law for trade secret misappropriation and conversion of Caterpillar property; specifically, the identity of materials that could achieve workable magnetic latching in a fuel injector valve in the absence of permanent magnets via use of the housing and armature with use material. Caterpillar claims this trade secret and/or property is reflected in a drawing created by Mr. Sturman at a meeting at Jumer's Castle Lodge in Peoria. In defense, the Sturmans contend that the alleged trade secret and/ or converted property was known to them prior to working with Caterpillar and was developed for a different Sturman client.

The Sturmans also contend that Caterpillar failed to designate its alleged trade secret as proprietary information as required by the JDA. You the jury will decide whether or not there was a misappropriation of the alleged trade secret and unlawful conversion and related issues.

Finally, Caterpillar claims that it is entitled to money damages for the Sturmans' breach of the JDA and trade secret misappropriation. Caterpillar claims nominal damages of one dollar for the Sturmans' alleged breach of contract. Cater- pillar further claims that the Sturmans have been and will be unjustly enriched as a result of misappropriating Caterpillar's trade secret rights. As a remedy, Caterpillar seeks nominal damages and an accounting of all profits wrongfully gained by the Sturmans as a result of their actions. The Sturmans deny all of Caterpillar's claims and deny that Caterpillar is entitled to damages or any other remedy. You the jury will decide these issues.

So, there you have, briefly, in a summary fashion, what this case is about. Sounds very complicated, doesn't it? Well, that's what the lawyers are for. They will make this case understandable to the jury. And at the end, when you are ready -- the jury is ready to decide this case, you will have all the information you need to make your decision, including the Court's instructions as to the law that applies to this case. So don't be dismayed by that summary of the case, which involves words that you might not know the meaning of or technology that you never knew existed. During the course of the trial, these things will be explained to you to the best of our ability. In fact, one of the first things I am going to do, once we select the jury, is to explain to the jury what this technology is. To give you an understanding of what we're talking about, what this magnetic latching is all about. I've had to learn it myself, and I think what I will give you will help you understand it. So don't be dismayed by what appears to be something that seems really beyond my head.

Well, let me tell you, it's not. A federal jury is capable of deciding any issue put to it. So don't let that bother you.

Now, Caterpillar has a right to bring this lawsuit. The Defendants have a right to defend against it. Both sides have a right to have a jury decide these issues. So there's no escaping it. You have a responsibility. Just because someone brings a lawsuit doesn't mean they necessarily should win. That's for the jury to decide, based on the evidence that you hear and the instructions of law that I will give you. If the Plaintiff, Caterpillar, proves its case consistent with the law I give you, then they are entitled to recovery damages. And I will tell you more about those damages, too, in my instructions.

Of course, if Caterpillar does not prove its case, then the case is over and one never gets to the issue of damages. Now, understand that this is an important role of the jury. I am the judge of the law, and basically I tell you what evidence you can hear. But once I allow the evidence in, you are the only one to decide what to make of that evidence. Because you are the judges of the facts. You will decide who's telling the truth, how much of any witness's testimony to believe. And after you've heard all of the evidence, you've heard the arguments by the lawyers, you know what my instructions of law is, you will apply the law to the facts that you find and in that way you will decide the issues in this case. Everything will fall into place.

Now, some jurors find themselves upset at the law which the Court gives them, because it's not as they believe the law should be. If that happens to you, please remember your duty as jurors requires you to follow my instructions on the law. You can't change it. You must accept it.

Now, we don't have a video of this trial, which means that you're going to have to remember evidence and what goes on here. And you can take notes, if you want to, and I'll tell you more about that later. But that means you're going to

have to be attentive. You're going to have to look and listen, because you're going to have to judge credibility. You're going to have to judge the testimony. You're going to have to decide the facts. In deciding the facts, if there are disputes over events, you're going to have to decide which witnesses to believe, partially or totally. So you got to be attentive.

Also, there is a procedure in which civil trials are conducted. Because the Plaintiff has the burden of proving that it's entitled to a win, the Plaintiff goes first in presenting evidence to you. All witnesses of the Plaintiff are subject to cross-examination by the Defendants. What I mean by cross-examination, normally, when you put on your own witness, we call it direct testimony; you can't ask your own witness leading questions. You know, where you give him what the answer is. Now, sometimes I allow that because I think it's just trying to develop the evidence. But normally you can't ask leading questions of your own witness. But on cross-examination, you can. So if there's someone else's witness on the witness stand, the opposing lawyer can ask that witness leading questions. So there's a difference in how the evidence comes out. This process is supposed to illuminate the issues for you, to help you decide what the facts are.

After the Plaintiff has put on all of the evidence that it wishes to put on, then the Defendants have the chance to put on all the evidence they wish to put on. All witnesses they put on are subject to cross-examination by Caterpillar's lawyers.

After both sides have put on all the evidence it wishes to put on, then the evidence phase is complete. Then the lawyers argue the case. They summarize evidence for you as from their perspective, giving their suggestions as to what you should or should not believe. And for what reasons. And they suggest to you what your verdict should be based on what they perceive the evidence shows. Now, what the lawyers say in argument is not evidence. That phase is

behind. You've heard that through the witnesses and the exhibits. And anything they say in argument that's not based on the evidence, you should disregard. But the arguments are meant to help you formulate some understanding of the evidence and of how you might decide the case.

After arguments are completed, then I will tell you what the law is. It will be in writing. I will give you a copy of them and I will also read it out loud to you, as I did earlier with the statement of the case.

After I give you the instructions, you now have everything you need to make your decision and you begin deliberations. So that's the process. I describe that to let you know that you're going to have to have an open mind. You're going to have to have an open mind until you've heard everything there is to hear, until you know what the law is. And I give you all this information to help you assess whether or not you can be fair and impartial to sit on this jury. Because now I'm getting down to the point where I'm ready to ask you questions to decide whether or not you can be fair and impartial.

Now, we started with 36, I believe, and we've already had five or six persons who can't serve. So that justifies me a little bit in having all of you come here this morning. I want to ask a question of all of you, and if it applies to you, then I expect you to respond appropriately.

Caterpillar is a large citizen in this district, this community, and I suspect there are lots of citizens who are impacted by Caterpillar's presence. It could be positive, it could be negative. I don't know. It could be such whereby you feel a predisposition to look with favor on Caterpillar, or it could be such that you may have negative feelings. You can't just think of Caterpillar without thinking about the fact that Caterpillar has a union. And quite often there's been conflicts between Caterpillar and its union. So there may be union members who have feelings about Caterpillar that will

prevent them from being fair and impartial. I'm not going to be able to ask all of the questions I can ask to really dig to find out whether or not you can be fair and impartial to Caterpillar. So I leave it up to your individual consciences to answer my question appropriately. Is there anyone here who simply because of Caterpillar's presence as a party feels that they could not be fair and impartial to both sides, including Caterpillar, in this case?

Okay. Just give me your number, and your name, and you can be excused, because I'm not going to question you about that. I'm accepting your judgment that you don't think you can. So just give me your name and number. Mr. Crouch, right?

MR. CROUCH: Yes.

THE COURT: All right.

MR. CROUCH: No. 19.

THE COURT: All right. You're excused, Mr. Crouch. You've got to call back Wednesday.

(Whereupon Mr. Crouch left the courtroom.)

THE COURT: Yes, sir.

MR. FITZANKO: No. 10.

THE COURT: No. 10. Mr. Fitzanko?

MR. FITZANKO: Yeah.

THE COURT: All right. You're excused, sir.

(Whereupon Mr. Fitzanko left the courtroom.)

MR. RAITT: No. 75.

THE COURT: Mr. Raitt?

MR. RAITT: Yes.

THE COURT: You're excused, sir.

MR. JONES: No. 33.

THE COURT: Mr. Jones?

MR. JONES: Correct.

THE COURT: You're excused.

(Whereupon Mr. Jones left the courtroom.)

THE COURT: Mr. Raitt, you left your book.

MR. RAITT: Oops.

(Whereupon Mr. Raitt left the courtroom.)

THE COURT: I appreciate the candor of those people. That's in the true tradition of American justice, because we want a fair and impartial jury in this case. Okay.

Now, you have met the attorneys and you have met the parties. You have met Mr. and Mrs. Sturman, who are parties, as well as Mrs. Sturman being an officer of the corporation. And you have met Mr. Maley, who is a representative of Caterpillar. Is there any of you who have any feelings, relationships or attitudes with reference to any of the other parties besides Caterpillar that would prevent you from being fair and impartial? (No response.)

THE COURT: Do any of you know any of the lawyers or parties? Or have any business/acquaintanceship relationships with them?

(No response.)

THE COURT: Now, because it's been mentioned to me by counsel, I feel I should mention it to you and have your response to it. I have not met Mr. and Mrs. Sturman before today, but the suggestion is that one or both may have a accent, which suggests that they may have a nationality other than a native American. Am I saying this fair? MR. STREFF: Yes, Your Honor.

THE COURT: And I want to know--. Should I be more direct? Are they -- are they --

MR. STREFF: That's fine, Your Honor, I believe you phrased it appropriately. Thank you.

THE COURT: So I want to know whether any of you would allow that -- and any implications resulting from someone having an accent that suggests they may not be a native, from another country, would that prevent you from being fair and impartial?

(No response.)

THE COURT: Do you have any feelings that would prevent you from being fair and impartial because of that fact?

(No response.)

THE COURT: No? I'm going to maybe ask these questions individually now, and there's quite a few that I'm going to be asking. And at some point I'm going to get tired of asking the question and I'm just going to ask you to tell me about yourself, and then I expect you to give me back the information that you know I'm looking for. So the first few of you are going to be test cases. You're going to have to take it for the rest of the group. In that connection, we have your juror sheet that you signed and mailed in. And I don't intend to ask all the questions or repeat them, but there may be some follow-up.

So the first person is Juror No. 13, Jerri Barron.

MS. BARRON: Barron.

THE COURT: Barron. And Mrs. Barron, your present employment is --

MS. BARRON: I'm retired.

THE COURT: And before you retired?

MS. BARRON: I worked at General Telephone Company.

THE COURT: And what did you do there?

MS. BARRON: I started out in the Accounting Department, I moved over into the Construction Department, and I ended up in Information Systems doing the computer work.

THE COURT: Okay. And your husband's occupation?

MS. BARRON: He's also retired from General Telephone Company.

THE COURT: And what did he do there?

MS. BARRON: He ended up being construction supervisor, putting in fiberoptic cable throughout the state of Illinois, and also parts of Wisconsin.

THE COURT: Okay. Now, I see where your hobbies are reading and doll collector.

MS. BARRON: Yes.

THE COURT: And what sort of dolls do you collect?

MS. BARRON: All kinds.

THE COURT: All kinds?

MS. BARRON: Yeah.

THE COURT: Okay. Now, do you and your husband have a hobby of, say, working on automobiles or some type of mechanical interests?

MS. BARRON: My husband built a collector car from the frame up and he worked -- has worked on them all along. And we no longer have any collector cars, but we just recently got rid of the last one.

THE COURT: Did you sort of help him when he worked on this car?

MS. BARRON: Not any more than I had to.

THE COURT: I bet you --

MS. BARRON: I have --

THE COURT: I bet you were looking over his shoulder.

MS. BARRON: I have some basic knowledge.

THE COURT: I suspect you weren't looking over his shoulder. Do you know what a fuel injector is?

MS. BARRON: Yes.

THE COURT: Do you have any adult children?

MS. BARRON: I have two adult boys.

THE COURT: And what do they do?

MS. BARRON: They both are in the locating business.

THE COURT: What do you mean by that?

MS. BARRON: They locate--. One of them is supervisor over GPLS, which is Great Plains Locating Service. They locate telephone cables --

THE COURT: Oh.

MS. BARRON: -- cable TV, water, electric. And the other son is working out of Pontiac doing the same thing.

THE COURT: Okay. Have any family members or a close friend ever been employed with Caterpillar, to your knowledge?

MS. BARRON: We have friends that have been employed by Caterpillar, but it's not anything that we've really discussed a whole lot.

THE COURT: Okay. And you have not--. Have you developed any attitudes towards Caterpillar as a result of your association with your friends that would cause you to have a bias or prejudice one way or the other?

MS. BARRON: No, sir.

THE COURT: Have any family members or close friends ever created anything, invented anything, or otherwise had some type of original idea that they consider patentable or subject to a trademark, anything like that?

MS. BARRON: No, sir.

THE COURT: Have any family members ever operated a business?

MS. BARRON: No, sir.

THE COURT: Now, a corporation is entitled to the same rights in a courtroom as an individual. You accept that principle?

MS. BARRON: Yes, I do.

THE COURT: Is there anything about the nature of this lawsuit that you think will prevent you from being fair and impartial?

MS. BARRON: No, sir.

THE COURT: Do you believe you can give both sides a fair trial?

MS. BARRON: Yes, I do.

THE COURT: Juror No. 61, Robert Brown.

MR. BROWN: Hello.

THE COURT: And the nature of your employment, Mr. Brown?

MR. BROWN: Work in a factory.

THE COURT: Is that Pittsburgh Tube?

MR. BROWN: I work at Pittsburgh Tube, yeah. I was a dirt ball about ten years ago, and now I run electromagnetic current testers.

THE COURT: Would you explain to me what that is.

MR. BROWN: Kind of like x-rays the tubes, see if it's a good weld or bad weld.

THE COURT: Okay. You didn't have anything to do with the Firestone tires, did you?

MR. BROWN: Not yet.

THE COURT: Not yet. Why do you say not yet?

MR. BROWN: Getting ready to buy some new tires.

THE COURT: Is it possible -- okay. And is your wife employed outside the home?

MR. BROWN: She's self-employed. She's a -- got her own business.

THE COURT: Okay. And you mind telling me what her business is?

MR. BROWN: She got a cleaning service.

THE COURT: Are you mechanically minded?

MR. BROWN: I used to be a shade-tree mechanic and then they got all this computerized and I just kind of give it up.

THE COURT: I know how you feel.

MR. BROWN: Yeah.

THE COURT: So would you know what a fuel injector is?

MR. BROWN: I have one on my truck at home, yeah.

THE COURT: You have one?

MR. BROWN: Fuel injection.

THE COURT: Yes. Okay. And have you ever worked on cars, you know, like under the hood, so to speak?

MR. BROWN: Yeah. Carburetors on back. But they got into fuel injection and computers, I pretty much give it up.

THE COURT: I got a feeling you don't like computers quite too much.

MR. BROWN: Well, they're a little over my head.

THE COURT: I understand that, too. Any adult children?

MR. BROWN: Yeah, one grown boy who's 20-some.

THE COURT: What does he do?

MR. BROWN: Right now he works for Pizza Hut over in Pontiac. He's mentally challenged.

THE COURT: Okay. Now, I see that one of the newspapers or magazines or periodicals that you have is AARP. Sure?

MR. BROWN: Oh, yeah.

THE COURT: Is that the Association of Retired People?

MR. BROWN: Exactly.

THE COURT: Who's retired?

MR. BROWN: Well, nobody, but I guess when you turn 50, you get a little bit of a discount on stuff, so when I turned 50, I got a card.

THE COURT: You're 50?

MR. BROWN: Yes. You want my age on it?

THE COURT: No, it's not that. You don't look 50.

MR. BROWN: Really? Thank you. I'm 60, right?

THE COURT: You're 60? Okay. Any family member or close friend ever worked at Caterpillar?

MR. BROWN: No.

THE COURT: To your knowledge, ever been refused employment at Caterpillar?

MR. BROWN: I have.

THE COURT: Okay. Do you have any feelings about that experience that would cause you to have a bias or prejudice in this case?

MR. BROWN: Prejudice, no. I think it's their loss. They should have hired me.

THE COURT: Good for you. Have any family member or close friend ever created or invented something that you thought was an original idea that could be patented or copyrighted or trademarked?

MR. BROWN: No.

THE COURT: Have you ever had your own business?

MR. BROWN: No, I haven't.

THE COURT: And you understand that a corporation in a court of law is entitled to the same rights as an individual?

MR. BROWN: Exactly.

THE COURT: And you accept that?

MR. BROWN: I do.

THE COURT: Is there anything about the nature of this lawsuit or the parties that you think would prevent you from being fair and impartial to both sides?

MR. BROWN: To be honest with you, right now it seems a little bit overwhelming. So --

THE COURT: Because I read that statement, right, about the case?

MR. BROWN: Yeah, it seemed kind of large.

THE COURT: I understand. But let me tell you this, and I say to everybody, don't underestimate an American jury. And I've been a judge for about 20 years, and let me tell you, you come from all walks of life, you don't all have college degrees, but you have common sense and native intelligence that's incomparable. So if you undertake to be a juror in this case, I expect you to do the job and you will, so don't be overwhelmed. Okay?

MR. BROWN: Okey-dokey.

THE COURT: All right. You believe you can give both sides a fair trial?

MR. BROWN: Yeah, I do believe starting out.

THE COURT: Yes. Okay. Fair enough.

Okay. Juror No. 79, Gerilyn Kegley.

MS. KEGLEY: Yes.

THE COURT: Kegley?

MS. KEGLEY: Uh-huh.

THE COURT: Okay. Okay. Tell me about yourself.

MS. KEGLEY: I'm executive assistant at United Work Force Development Board, Inc. in Pekin. We share an office with Illinois Department of Employment Security, the One-Stop Center. I assist the president and vice president of the Bloomington office also. I've been there for five years this July. I have three children. My oldest daughter is married and has five children. I have a 22-year-old son who is attending Illinois Central College and also is -- works at

Golds Gym in Morton, and then I have a 13-year-old daughter. My husband is an employee of Caterpillar. He is in management at the Mossville plant, in assembly. I'm not mechanically inclined. He has worked on a lot of our automobiles. I do believe I know what a fuel injection system is. Let's see --

THE COURT: Well, let me ask you something about your husband.

MS. KEGLEY: Okay.

THE COURT: How long has he worked at Caterpillar?

MS. KEGLEY: 30 years in February.

THE COURT: Has he always been in management as a supervisor?

MS. KEGLEY: No. He worked in security for 24 years, and he just went up to--. He was a supervisor in security, and then he went into manufacturing, because they were phasing out the security service, so he went into manufacturing. They requested he go out there. He worked the block line for two years and then they put him on assembly.

THE COURT: Okay. Had you prior to today heard anything about this lawsuit?

MS. KEGLEY: No, I have not.

THE COURT: Do you feel that your involvement in this case will create any type of problem with, say, with your husband?

MS. KEGLEY: I would hope not.

THE COURT: As you sit here right now, do you feel that -- that you should lean toward or against Caterpillar in this case?

MS. KEGLEY: I don't think I should lean to -- I think I could be fair and impartial, I do believe. I mean, Cater- pillar has been a major part of my life. My father worked there, and Caterpillar's -- and, like I say, my husband has always worked there all the years we've been married, so, you know, they have been good to us, but I do believe that as a citizen I'm, you know, responsible to be fair and impartial. If so chosen. I should also say that my oldest daughter, her husband has just recently became employed by Caterpillar in a temporary situation, and he is also in assembly at Mossville.

THE COURT: So he's in the union?

MS. KEGLEY: No, he's not, because he is a temporary employee.

THE COURT: Oh, okay. What sport does your daughter play?

MS. KEGLEY: Everything. She is going into the 8th grade and she is excellent in basketball, volleyball, track and travel softball. So we are very busy with her.

THE COURT: I understand. My daughters played athletics in high school, too, and it was a joy to watch them.

MS. KEGLEY: It is.

THE COURT: Now, have anyone in your family or close friends ever created, invented something that was original or that could have been patented or trademarked?

MS. KEGLEY: Not to my knowledge.

THE COURT: Has anyone ever operated a business?

MS. KEGLEY: No.

THE COURT: And you understand that a corporation has the same rights in court as an individual has?

MS. KEGLEY: I do.

THE COURT: And is there anything about the nature of this case, as much as you've heard, that you think would prevent you from being fair and impartial to both sides?

MS. KEGLEY: No.

THE COURT: You can give both sides a fair trial?

MS. KEGLEY: I believe so.

THE COURT: Okay. Juror No. 6, Brenda -- no. Am I missing somebody?

MS. ROSIAK: That's me.

THE COURT: Yes, Brenda Rosiak.

MS. ROSIAK: Uh-huh.

THE COURT: Okay. All right. Tell me about yourself, Mrs. Rosiak.

MS. ROSIAK: I work at RLI Insurance Company. I'm a processing clerk in data entry and do the checks. Stamping mail, all that kind of office stuff. My husband does work at Caterpillar. He's been there for 29 years. He was a welder, and now he gives out transmission gears and stuff.

THE COURT: Is he still in the union or is he management?

MS. ROSIAK: He's union.

THE COURT: He's union. Okay.

MS. ROSIAK: And I have three grown children, two sons and a daughter. Two that are married, and my older son is a -- has his own place and works at the Rec Center. My daughter works at the Journal Star, and my other son works at Multi Ad. He's a graphic arts designer.

THE COURT: And I see where you served on a jury about six years ago.

MS. ROSIAK: Yes, I did.

THE COURT: Was that in federal court or state court?

MS. ROSIAK: It is --

THE COURT: Down the street?

MS. ROSIAK: No, it was in Tazewell County.

THE COURT: Oh, Tazewell County, so --

MS. ROSIAK: A DUI case.

THE COURT: What was the case about?

MS. ROSIAK: It was a DUI case.

THE COURT: Oh, a criminal case, so to speak?

MS. ROSIAK: Yeah.

THE COURT: Did it go to verdict?

MS. ROSIAK: Yes, it did.

THE COURT: Then, you were told by the judge that the State had to prove the Defendant's guilt beyond a reasonable doubt. That's the standard of proof in a criminal case. This is a civil case, so there is a different burden of proof. You will be told in this case that the Plaintiff has to prove its case by a preponderance of the evidence. Is something more probably true than not true. Will you follow my instructions in this regard and disregard what you were told in that criminal case that you sat on six years ago?

MS. ROSIAK: Yes, sir.

THE COURT: Now, have any of your family members or close friends ever been employed by Caterpillar or applied for work at Caterpillar?

MS. ROSIAK: I have some cousins that work there, too.

THE COURT: Are they--. You have some cousins who did work there?

MS. ROSIAK: Yes.

THE COURT: Okay. Were they union or management?

MS. ROSIAK: They were union.

THE COURT: And were they--. How close are you to these cousins? I mean, do you socialize with them?

MS. ROSIAK: Yeah, some, like at family get-togethers.

THE COURT: Okay. Were they affected by any of the strikes that have happened in the past ten years, say? Nothing stands out in your mind?

MS. ROSIAK: No, not really.

THE COURT: Because my follow-up was whether or not, you know, they shared with you any attitudes and feelings they had that might have affected your ability to be fair and impartial.

MS. ROSIAK: Oh, no, not really.

THE COURT: Okay. What about inventions, anything that you've come up with, some idea -- some original idea that you thought could be patented or trademarked or copyrighted, anything like that in your family?

MS. ROSIAK: No.

THE COURT: Anyone ever operate a business?

MS. ROSIAK: No.

THE COURT: Formed a corporation for any purpose?

MS. ROSIAK: No.

THE COURT: Is there anything about this lawsuit you think will prevent you from being fair and impartial?

MS. ROSIAK: No, I don't think so.

THE COURT: You believe you can give both sides a fair trial?

MS. ROSIAK: Yes, I do. I believe in honesty.

THE COURT: Okay. All right. Let's pass the mic to Mrs. Silldorff, Juror No. 72. And Mrs. Silldorff, tell me about yourself.

MS. SILLDORFF: I work part-time for my husband, who is a realtor for Coldwell Bankers. I am -- I retired from Peoria Journal Star about twelve years ago. I worked in the Billing Department, and Customer Complaint Department. I have three grown children and two grown stepchildren. My son is a teacher/coach at Metamora High School. My daughter is a nurse in Galesburg, and my youngest daughter works for Caterpillar as a computer programmer. My stepson is a minister, youth minister, in Charlotte, North Carolina, and my stepdaughter is in musical therapy in Florida. My husband is retired from Caterpillar. He was union. I--. My husband had a business at one time, Image Photography. We took wedding pictures and portraits and things like that. And too much stress involved and gave the business up. Also, my father ran a business. I grew up in a business situation. My father ran a tavern. And as far as inventions, my husband has a real good friend that has come up with something that he thinks should be patented and -- but he's never done anything about it.

THE COURT: Going back to your husband's business, did your husband -- did you work in the business with him?

MS. SILLDORFF: Yes. I helped him with the pictures, yes.

THE COURT: Did you do the books?

MS. SILLDORFF: Yes, I did.

THE COURT: Okay. Did you guys have a standard contract form?

MS. SILLDORFF: Yes, we did.

THE COURT: Did you ever have any disputes concerning your contracts?

MS. SILLDORFF: Yes, we did.

THE COURT: I mean where the contract became important in deciding --

MS. SILLDORFF: Yes.

THE COURT: -- the rights.

MS. SILLDORFF: Yes, we did.

THE COURT: Did any of that end up in court at any time? MS. SILLDORFF: No, it did not.

THE COURT: Okay. You were always able to work it out?

MS. SILLDORFF: Right.

THE COURT: Now, did you have a hand in designing the contract form or was it just done for you by lawyers?

MS. SILLDORFF: It was done by an attorney for us.

THE COURT: Okay. Did you have any input in what went into the contract?

MS. SILLDORFF: I did not. I'm sure my husband did, but I did not.

THE COURT: Okay. Anyone mechanically minded in your family that works on cars or other type of motors or engines?

MS. SILLDORFF: My husband has tinkered a little bit. And like one of the other possible jurors, I do -- I think I

do know what a fuel injection system is, but that's about as far as it goes. I'm not real mechanically inclined.

THE COURT: Okay. Is there anything about this lawsuit you think would prevent you from being fair and impartial?

MS. SILLDORFF: No.

THE COURT: You think you can give both sides a fair trial?

MS. SILLDORFF: Yes, I do.

THE COURT: Okay. Juror No. 48, Warren Stovall. Stovall is right?

MR. STOVALL: Yes, that's true.

THE COURT: Your face looks awful familiar, Mr. Stovall. Have we met before, sir?

MR. STOVALL: I don't believe so, sir.

THE COURT: You don't believe so?

MR. STOVALL: But I watched you when you were a younger man. Enjoyed --

THE COURT: You mean last week?

MR. STOVALL: No. You did play basketball for Bradley?

THE COURT: Yes, I did. And --

MR. STOVALL: I thought you did. I was a young, young man.

THE COURT: Well, thank you very much. That was a long, long, long time ago.

MR. STOVALL: I'm retired from Caterpillar. I put twenty-eight and a half years in. And never union, I was always -- always on the management side. And two kids and a wife. Both girls work at Caterpillar.

THE COURT: What do they do there?

MR. STOVALL: One is a computer analyst/programmer. And the other is part-time.

THE COURT: And your wife, is she still --

MR. STOVALL: She's a remarriage, and she's retired also. She's just a housewife.

THE COURT: Okay.

MR. STOVALL: I'm not mechanical. I do know what a fuel injection system is. I don't know how it works. I have no idea what magnets have to do with the operation of it. But I soon will learn.

THE COURT: And you never had a business?

MR. STOVALL: No, no. I'm retired. I've been retired for nine years. Enjoy it.

THE COURT: Did you ever -- anyone ever invented something or --

MR. STOVALL: No.

THE COURT: Nothing like that. Is there anything about this case that you think would prevent you from being fair and impartial?

MR. STOVALL: No, not at all.

THE COURT: And you believe you can be fair to both sides?

MR. STOVALL: Yes, I do.

THE COURT: And if you were persuaded by the law and the evidence that Caterpillar had not made out its case, could you decide the case in favor of the Defendants?

MR. STOVALL: Yes, I could.

THE COURT: And, likewise, if under the law and evidence Caterpillar does make out its case, you could return a verdict for Caterpillar, could you?

MR. STOVALL: Yes.

THE COURT: So you could be fair to both sides.

MR. STOVALL: Yes, I could.

THE COURT: Juror No. 26, Rose Humphrey.

MS. HUMPHREY: Yes. I'm married, have been married for 40 years. I'm just a housewife and a grandma and love it. I have two grown daughters. One works for a doctor and one's a stay-home mom. My husband does work at Gates Rubber Company, has been there for 35 years. Outside of that, have a boring life.

THE COURT: Well --

MS. HUMPHREY: Nothing real exciting goes on, just being a grandma, which I love.

THE COURT: But you're not just a housewife. I've learned my lesson.

MS. HUMPHREY: And I know nothing about a fuel injector. All I know is, a car, got to have one, and if something goes wrong, you take it to the car dealership.

THE COURT: You know, I don't know why women under- rate themselves. You run this country, you women. And all of the decisions you make every day. We men think we're making them all. We don't make them. I mean, I know who really runs things around here. You don't fool me with this I-don't-know- anything bit.

Now, you were on a jury --

MS. HUMPHREY: Yes, I was.

THE COURT: -- sometime some years ago. You don't really remember the year?

MS. HUMPHREY: It was in the, probably, early '90s.

THE COURT: What kind of case was it?

MS. HUMPHREY: It--. Well, I was on a couple of different ones. The one that went to jury was an accident, car accident --

THE COURT: Uh-huh.

MS. HUMPHREY: -- that had happened --

THE COURT: Uh-huh.

MS. HUMPHREY: -- and they were suing for damages.

THE COURT: Okay. And the other one didn't go to the jury, I take it.

MS. HUMPHREY: No.

THE COURT: Okay.

MS. HUMPHREY: It was settled out of court.

THE COURT: Okay. So can I take it that there's nothing about those two jury experiences that will carry over to your work here in this case if you are selected for the jury?

MS. HUMPHREY: No, there was nothing.

THE COURT: And did you mention that you're not mechanical minded? What about your husband?

MS. HUMPHREY: Well, he's a little worse than I am.

THE COURT: Worse?

MS. HUMPHREY: Anything goes wrong, we got to call the car place. He can change a tire, though.

THE COURT: Okay.

MS. HUMPHREY: But that's about it.

THE COURT: All right. Anything you've ever come up with, or friend, that's in the nature of any invention or something that you thought you would like to protect by a patent or something?

MS. HUMPHREY: No.

THE COURT: Ever had your own business?

MS. HUMPHREY: No. I have worked retail, you know, for a number of years off and on, but that was about it.

THE COURT: Uh-huh. Okay. Anything about this lawsuit you think would prevent you from being fair and impartial?

MS. HUMPHREY: No.

THE COURT: You believe you can give both sides a fair trial?

MS. HUMPHREY: Yes, I do.

THE COURT: Okay. Juror No. 22, Gary Craig.

MR. CRAIG: Yes, sir.

THE COURT: And tell me about yourself, Mr. Craig.

MR. CRAIG: I work for State Farm Insurance. I started there down in, well, the maintenance ranks as a union employee and worked my way up to data processing.

THE COURT: Okay. And is your wife employed outside the home?

MR. CRAIG: Hopefully my soon-to-be ex will be, yeah. Yeah, she's employed.

THE COURT: Any adult children?

MR. CRAIG: No, sir.

THE COURT: Oh, I didn't catch what you said. I just caught it. I hope so too.

MR. CRAIG: Well, we got postponed because her lawyer wanted to go on vacation, so I'm not too pleased with lawyers right now.

THE COURT: You're not too pleased with lawyers?

MR. CRAIG: That's right.

THE COURT: What about judges, federal judges?

MR. CRAIG: They're okay. Federal judges are okay.

THE COURT: Federal judges are okay. All right. Any adult children?

MR. CRAIG: No, sir.

THE COURT: So you don't have to worry about child support.

MR. CRAIG: That's true.

THE COURT: We won't talk about the other thing.

MR. CRAIG: Thank you.

THE COURT: Are you mechanically minded?

MR. CRAIG: Yes. I worked, as I said, in the maintenance field when I started at State Farm.

THE COURT: So you probably know what a fuel injector is.

MR. CRAIG: Yes, I do.

THE COURT: Have you ever or had close friends or family members who have invented something or came up with an idea that could have been --

MR. CRAIG: My wife's father invented the electric solenoid for GE.

THE COURT: Oh, could you explain that to me, please?

MR. CRAIG: He was working at GE as an electrical wiring supervisor --

THE COURT: Uh-huh.

MR. CRAIG: -- and on his home -- home turf he invented a solenoid that's currently used all over the place.

THE COURT: Yes, but could you tell me what a solenoid is?

MR. CRAIG: It's a magnetically conducted coil which operates a magnetized bar to -- a magnetized bar to open and close valves.

THE COURT: You see, folks? You hear that? Seriously, I didn't know that much and I'm curious. Now, did he have to share this with GE?

MR. CRAIG: He--. Well, since he developed it on his home turf, they give him a pittance of about, I think it was, three cents per valve sold so, yeah, you might say I might be a little prejudiced on that one.

THE COURT: Which way?

MR. CRAIG: Towards the big company.

THE COURT: Towards the big company or against the big company?

MR. CRAIG: Against.

THE COURT: Against the big company?

MR. CRAIG: Yeah.

THE COURT: In other words, you feel that GE did not treat him fairly.

MR. CRAIG: Did not treat him fairly, no.

THE COURT: Okay. And in your view, what should they have done?

MR. CRAIG: Since he had developed it on his own -- own turf and was not going to patent it, was willing to share it with GE, they should have split the proceeds.

THE COURT: Okay. Now, I take it there was no under- standing before he came up with the idea that --

MR. CRAIG: No, sir.

THE COURT: -- anything he did had to become the property of GE. There was no such understanding?

MR. CRAIG: Not that I'm aware of.

THE COURT: Okay. So a situation where he did something and they didn't treat him fair.

MR. CRAIG: Right.

THE COURT: Now, what little you know about this case, from what I told you in that statement, do you feel that this situation involving your relative would prevent you from being fair and impartial to both sides in this case or do you think that --

MR. CRAIG: It might.

THE COURT: It might --

MR. CRAIG: It might.

THE COURT: -- affect your decision?

MR. CRAIG: Yes, sir.

THE COURT: Okay. I want to have a sidebar with you and the lawyers.

(The following sidebar conference was held out of the hearing of the jury panel.)

THE COURT: Okay. This is one of those things that's always conflicted me. Someone who has some knowledge, they could be helpful; on the other hand, one might not want to have such a knowledgeable witness. So I

thought I would at least give you an opportunity to ask questions of him before I make my decision.

MR. ABRAMS: Well --

MR. STREFF: You're the Plaintiff, you get to go first.

MR. ABRAMS: Sir, you said you -- I have to speak over here -- you might be prejudiced against a big company; in this case, the big company is Caterpillar.

MR. CRAIG: That's true, yes.

MR. ABRAMS: And I'm looking, and I think the Court's looking, we're all just looking for a fair and impartial juror, and if you do think --

MR. CRAIG: I don't think I could because, you know, it's the way I feel. I mean, if it had been something else, you know, I'd be more than willing to stick around, but the more I think about it --

THE COURT: Okay, that's fair enough. I'm glad I called you over, because you made it very clear. I will excuse you. Call back Wednesday.

MR. CRAIG: Yes, sir.

MR. ABRAMS: Thank you very much.

(Whereupon Mr. Craig left the courtroom.)

(The following proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Juror No. 52, Ida Dungey.

MS. DUNGEY: Dungey.

THE COURT: Dungey.

MS. DUNGEY: Yes, sir.

THE COURT: I'm sorry. Tell me about yourself, Mrs. Dungey.

MS. DUNGEY: For the past 18 years I've been employed by Pantagraph Printing and Stationery in Bloomington. Basically I'm the receptionist. I fill in for other jobs when I can. I have two grown daughters. I have a daughter who is a vice president of mortgage trading at National City Bank in Ohio. I have a daughter who also works with mortgage banking in Upper Marlboro, Maryland. My husband has owned and operated an auto repair machine shop for the past 40 years.

THE COURT: Have you done any work in that shop like keeping books for him, anything like that?

MS. DUNGEY: I write the payroll, and I hear about it, but that's as far as --

THE COURT: Okay.

MS. DUNGEY: I don't -- I've never worked; don't think that would work very well.

THE COURT: Okay. Why both daughters in mortgage banking? Is there something -- is there a story behind that?

MS. DUNGEY: No. Well, my oldest daughter started working right out of high school for Bloomington Federal, which became several different banks, which is now National City, and she just kind of worked her way up to what she's doing now. My youngest daughter went through school for a Ph.D. in English, was going to teach college English and ended up not being able to find a position at the time, went to work at the same bank with my oldest daughter, decided she liked it, and she's still there.

THE COURT: Now, your husband's business, how large is it? I mean, how many people does he employ?

MS. DUNGEY: He has three employees. It's a very small business.

THE COURT: Very small? Okay. And I suspect you know what a fuel injector is.

MS. DUNGEY: I do. My husband's major hobby is tractor pulling, so we live -- we eat, sleep and drink auto parts and mechanical things and --

THE COURT: Well, you know, I find that very interesting because I went to a horse-pulling thing once; you know, where these big draft horses pull sleds with --

MS. DUNGEY: Right.

THE COURT: -- a cement box on them. Boy, that was exciting. I've never been to a tractor pull, though. I take it it's similar to the horse pull.

MS. DUNGEY: Well, no, not -- well, it's a similar idea, where they pull weighted sleds.

THE COURT: Uh-huh.

MS. DUNGEY: But my husband's tractor is a 20 -- a 2000-pound mini rod. Looks like an overgrown garden tractor --

THE COURT: Oh, really?

MS. DUNGEY: -- with a -- the engine has a little over 2000 horsepower. It's the wildest ride on wheels.

THE COURT: Is he good?

MS. DUNGEY: Well, right now he pulls for National Tractor Pulling Association, travels all over the country --

THE COURT: Wow.

MS. DUNGEY: -- and right now he's No. 6 out of 22 tractors.

THE COURT: Wow. Congratulations.

MS. DUNGEY: That's why I work every day. Not really.

THE COURT: Does he soup up the engine?

MS. DUNGEY: Yes, a lot.

THE COURT: A lot. Hmm. Amazing. And is it the weight that determines whether you win or lose?

MS. DUNGEY: Correct.

THE COURT: I mean, how much weight that you pull.

MS. DUNGEY: Right. The sled looks like a part of a semi. It has a white box on it that starts at the back, and it goes up -- as the tractor pulls down the track, the weight box goes up and it gradually puts more weight on the tractor to slow it down.

THE COURT: Now, does he have -- does he use fuel injectors in his tractor?

MS. DUNGEY: It's blown and injected, yes.

THE COURT: He does. Do you know why he does that?

MS. DUNGEY: No, everybody else does; I don't.

THE COURT: Okay.

MS. DUNGEY: To make more horsepower, I'm sure.

THE COURT: Okay. But you don't understand the --

MS. DUNGEY: No. I heard it -- I mean, I hear it all the time, but it goes in this ear and out this ear.

THE COURT: Okay. Now, is he going to be at the Illinois State Fair? Are they going to have this event at the Illinois State Fair in Springfield?

MS. DUNGEY: No. He used to pull -- when he pulled Illinois tractor pulls, he pulled at the state fair and also

out here. But now that he does National, he doesn't pull. He only has one pull in Illinois, and that's at Sandwich.

THE COURT: So where -- what's the closest pull around this area?

MS. DUNGEY: Sandwich, Illinois, De Kalb County Fair. It's in September.

THE COURT: De Kalb?

MS. DUNGEY: De Kalb County.

THE COURT: What large city is in there?

MS. DUNGEY: It's not all that far, I don't believe, from Chicago, actually. It's --

THE COURT: Oh. All right. Okay. Has your husband invented anything or --

MS. DUNGEY: No.

THE COURT: -- came up with any new conception in his business?

MS. DUNGEY: I'm sure he -- he invents things for himself --

THE COURT: Uh-huh.

MS. DUNGEY: -- in building his tractors and things, but not -- not anything that he ever wanted to have --

THE COURT: Okay. Anyone in your family ever been employed at Caterpillar?

MS. DUNGEY: No. My father-in-law retired from Caterpillar in Decatur probably 20 years ago.

THE COURT: Okay. And has your husband ever had to go to court about any contract he's entered into in his business?

MS. DUNGEY: He's had to take some people to small claims court for not paying their bill, but that's --

THE COURT: Okay. But you haven't really had any contract disputes --

MS. DUNGEY: No.

THE COURT: -- in your life.

Okay. Is there anything about this lawsuit, based on what you know now, which isn't too much, I guess, that you think would prevent you from being fair and impartial?

MS. DUNGEY: I don't believe so. I believe I can give --

THE COURT: You believe you can give a fair trial to both sides?

MS. DUNGEY: I think I could, yes.

THE COURT: What is counted cross-stitch?

MS. DUNGEY: It's where you take a piece of cloth and a pattern, and you count the stitches in the design and transfer it over to the -- the design is not printed on the cloth.

THE COURT: Oh, I see.

MS. DUNGEY: You put it on there.

THE COURT: Okay. I got to tell you, there's a reason for my asking this, because I'm interested in that.

MS. DUNGEY: It's interesting.

THE COURT: I go to a couple of judicial conferences. There's a couple of female judges and while all this boring stuff is going on, they're busy doing something. I think that's so neat, to be doing something useful while you're listening, you know.

MS. DUNGEY: Right.

THE COURT: So --

MS. DUNGEY: That's how I watch television, by doing counted cross-stitch.

THE COURT: So I'm thinking about doing something useful. You know, when you're 6 feet 6, you can get away with these strange ideas; no one's going to think ill of you, I hope. Okay. Did I forget anything? To ask you.

MS. DUNGEY: I don't think so.

THE COURT: You don't think so? I don't think so either. I think I'm okay.

Okay. Juror No. 63, Deborah Campbell. I got to tell you, I enjoy jury selection. I meet such interesting people. The trial, we can forget about the trial, let's just stop at jury selection. But, Mrs. Campbell, tell me about yourself.

MS. CAMPBELL: My husband owns an advertising company in Bloomington. He has five employees; it's a small business. He sells advertising specialties, and I'm stuck doing all the filing for him because he can't find anybody else to do it. And I have one daughter who is married and is a loan officer at a bank in Indiana, and I don't work on cars.

THE COURT: What about your husband?

MS. CAMPBELL: No, I'm a lot more mechanically inclined than he is.

THE COURT: All right. Anyone in your family or close friends ever been employed by Caterpillar?

MS. CAMPBELL: No.

THE COURT: Okay. What about any inventions created or ideas that were patentable or copyrightable?

MS. CAMPBELL: No.

THE COURT: Business owned by anybody?

MS. CAMPBELL: My husband.

THE COURT: Except your husband, of course.

MS. CAMPBELL: Yeah.

THE COURT: Have you ever had a contract dispute --

MS. CAMPBELL: No.

THE COURT: -- that went to litigation, as far as you know?

MS. CAMPBELL: No.

THE COURT: Okay. Anything about the nature of this case that you think would prevent you from being fair and impartial?

MS. CAMPBELL: No.

THE COURT: You believe you can give both sides a fair trial?

MS. CAMPBELL: Yes.

THE COURT: Any adult children?

MS. CAMPBELL: Yes, one daughter.

THE COURT: Oh, that's right. Did you tell me that? Oh. All right.

Okay. Let's move on. Juror No. 65, Charles Ulbricht.

MR. ULBRICHT: Ulbricht, yes.

THE COURT: Ulbricht, okay. And tell me about yourself, Mr. Ulbricht.

MR. ULBRICHT: I work for Caterpillar. I've been there about 25 years. I work in the marketing area. I'm a product and application consultant with Petroleum Power Group. I'm somewhat familiar with fuel injectors.

THE COURT: Did you have any knowledge of this lawsuit?

MR. ULBRICHT: No.

THE COURT: Before today.

MR. ULBRICHT: None at all.

THE COURT: And I take it in your marketing capacity you have had occasion to perhaps write copy that involved fuel injector systems, or have you?

MR. ULBRICHT: No, I'm -- I've not written anything concerning fuel injection. I've read and disseminated some of that material, though.

THE COURT: Okay. And is your wife employed outside the home?

MR. ULBRICHT: She's a homemaker and has a small part-time business.

THE COURT: What business is that?

MR. ULBRICHT: Decorator pillows.

THE COURT: Decorated pillows?

MR. ULBRICHT: Yes.

THE COURT: With stitches? I mean, she stitches stuff on them?

MR. ULBRICHT: No.

THE COURT: What does she do?

MR. ULBRICHT: Well, she sews them.

THE COURT: No, they imprint -- they just have something like -- what do you call that?

MR. ULBRICHT: Cross-stitch or --

THE COURT: No, no, no. When you have a T-shirt and you have --

MR. ULBRICHT: Iron-on?

THE COURT: Yeah. Is that what she does?

MR. ULBRICHT: Applique? No, this is to match custom bedspreads and stuff.

THE COURT: Oh. Oh. Okay. And any adult children?

MR. ULBRICHT: Yes, I have one daughter. And she's an assistant manager in a furniture store.

THE COURT: Okay. And you served on a jury a few years ago, but it was a criminal case?

MR. ULBRICHT: Yes.

THE COURT: And did it go to verdict?

MR. ULBRICHT: Yes, it did.

THE COURT: And you heard what I said to the other juror about the difference in the burden of proof and how you should disregard what you were told in the criminal case and apply the law as I give it to you in the civil case?

MR. ULBRICHT: Yes, sir.

THE COURT: And you can do that?

MR. ULBRICHT: Yes.

THE COURT: Anyone in your family ever been employed at Caterpillar, or close friend?

MR. ULBRICHT: I have several close friends that are employed at Caterpillar.

THE COURT: Oh, that's right, because you work there.

MR. ULBRICHT: And relatives, too.

THE COURT: Are they all management or there's some union too?

MR. ULBRICHT: There's a mixture.

THE COURT: Okay, a mixture. Do you have any reservations about serving on this jury?

MR. ULBRICHT: No

THE COURT: And if the -- if--. Under the law and the evidence, in doing your duty as a juror, you -- are you capable of finding against Caterpillar?

MR. ULBRICHT: Yes, sir.

THE COURT: And vice versa, of course. If the law and evidence would suggest it to you, you would vote in favor of Caterpillar. Is that a fair statement?

MR. ULBRICHT: Yes, sir.

THE COURT: You can be fair to both sides?

MR. ULBRICHT: Yes, sir.

THE COURT: But as you sit here today, the playing field is level in your mind?

MR. ULBRICHT: I hope so. It should be.

THE COURT: Yes, it should be. Okay. You've never owned your own business, have you?

MR. ULBRICHT: No.

THE COURT: And you believe you can be fair to both sides?

MR. ULBRICHT: Yes.

THE COURT: Juror No. 69, Tim Miller.

MR. MILLER: Yes. I work at Mitsubishi Motor Manufacturing of America, and my wife works at State Farm. And I have two sons, 13 -- I'm sorry, their birthday was yesterday -- 14 and 11. And they're both pony baseball players.

THE COURT: What position?

MR. MILLER: Actually, they move around quite a bit.

THE COURT: Have they ever caught?

MR. MILLER: Oh, yeah.

THE COURT: I think that's the best position on the field.

MR. MILLER: Well, I like them pitching.

THE COURT: You like them pitching. Well, they're both -- the two best positions. My son-in-law was a professional catcher, baseball catcher, so I've gotten acquainted with that position, more so than the pitcher's involved in the game, because he's facing eight other plays.

MR. MILLER: Yeah. Has more control.

THE COURT: Huh?

MR. MILLER: The pitcher has more control. I think.

THE COURT: What do you think happens when the catcher goes out to the mound?

MR. MILLER: Pitcher tells him to go back behind home plate.

THE COURT: I was thinking of that. I was thinking that Mark White told the catcher go back, you know, don't come another step.

MR. MILLER: At Mitsubishi, I work in Chassis 5, which is putting together engines, so I have quite a bit of knowledge and I do tinker with engines at home.

THE COURT: Okay. So you know what a fuel injector system is.

MR. MILLER: Yes.

THE COURT: Do you personally work on one? Do you personally get involved in working on --

MR. MILLER: Actually, more transmissions area, but the fuel injectors are already put on the engines when they're shipped in.

THE COURT: Okay. And did you say you sort of tinker with --

MR. MILLER: Yes.

THE COURT: -- automobiles and engines --

MR. MILLER: Yeah.

THE COURT: -- off --

MR. MILLER: Okay.

THE COURT: You're not -- you don't drive them -- you don't drive tractors or anything like that, do you?

MR. MILLER: No, no.

THE COURT: Okay. And is your wife employed -- oh, that's at State Farm. You told me that.

MR. MILLER: Yeah.

THE COURT: No adult children. You're too young for that. Right?

MR. MILLER: Right.

THE COURT: And do you have any friends -- family member or friends who work at Caterpillar?

MR. MILLER: I had an uncle that worked there years ago; he passed away. James Hewitt. He didn't really discuss anything about Caterpillar.

THE COURT: Anyone in your family or close friend ever invented anything or been involved with anything that could be invented?

MR. MILLER: No.

THE COURT: Or patented, copyrighted.

MR. MILLER: No.

THE COURT: Nothing like that?

MR. MILLER: No.

THE COURT: Okay. Anything about this lawsuit you think would prevent you from being fair and impartial?

MR. MILLER: No.

THE COURT: You believe you can give both sides a fair trial?

MR. MILLER: Correct.

THE COURT: I tell you what we're going to do. I'm going to finish this row out, then we'll break for lunch, so just bear with me.

Okay. No. 3, Diana Adams-Trantham. Trentham.

MS. ADAMS-TRANTHAM: Yes.

THE COURT: T-r-e-n- --

MS. ADAMS-TRANTHAM: T-r-a.

THE COURT: Trantham?

MS. ADAMS-TRANTHAM: (Nodded head up and down.)

THE COURT: Trantham.

MS. ADAMS-TRANTHAM: That's right.

THE COURT: It's sometimes hard for me to understand some writing around here.

Tell me about yourself, Mrs. Trantham.

MS. ADAMS-TRANTHAM: I'm currently employed as a bookkeeper for a doctor, and formerly I was part bookkeeper and medical assistant for another doctor.

THE COURT: Uh-huh.

MS. ADAMS-TRANTHAM: And I'm married and my husband is employed for Caterpillar. He's union. We have friends both union and management. I have a son that's

11, and he's -- he goes to Peoria Christian. He loves soccer. He plays other sports, but that's his favorite, I think.

THE COURT: Is he watching the America's Cup, or the World Cup?

MS. ADAMS-TRANTHAM: Oh, yes.

THE COURT: Is he?

MS. ADAMS-TRANTHAM: Yes, yes.

THE COURT: Okay.

MS. ADAMS-TRANTHAM: I have a friend that is currently in the process of getting a book published and patented for. She's a teacher, and it's -- they're games for kids that have learning disabilities.

THE COURT: Oh, interesting.

MS. ADAMS-TRANTHAM: And --

THE COURT: And the games are meant to teach what skill?

MS. ADAMS-TRANTHAM: Well, it's -- I think -- well, I'm not real sure. She doesn't really talk about it.

THE COURT: Okay.

MS. ADAMS-TRANTHAM: But it teaches developmental skills and also communication skills. That, I'm sure of.

THE COURT: Okay. And anyone in your family ever operate a business?

MS. ADAMS-TRANTHAM: I believe I have an uncle that operated a janitorial business --

THE COURT: Uh-huh.

MS. ADAMS-TRANTHAM: -- some years ago.

THE COURT: Uh-huh.

MS. ADAMS-TRANTHAM: I'm originally from North Carolina, and that's where he was.

THE COURT: Okay. And is there anything about this case you think would prevent you from being fair and impartial?

MS. ADAMS-TRANTHAM: No, I do not.

THE COURT: You believe you can give both sides a fair trial?

MS. ADAMS-TRANTHAM: Yes.

THE COURT: Okay. Juror No. 5, Hester McCosh.

MS. McCOSH: Yes, sir.

THE COURT: Okay. Mrs. McCosh, tell me about yourself.

MS. McCOSH: I'm employed at Caterpillar. I worked both the manufacturing and assembly side of the wall. I've been there 28 years. I now work in final inspection as a data entry clerk. I used to own my own business, an accounting business. I had a partner. I've since sold it. I have several relatives that are employed at Caterpillar. We span the whole. Union, management, a little of both. We have a rule in our family, though. We don't talk about Caterpillar when we get together. The spouses won't let us.

THE COURT: Uh-huh.

MS. McCOSH: I have two grown children, and one grandson. My son is employed by Central Pool. It's a warehouse and retail facility in Pioneer Park. And my daughter is a school bus driver. My grandson is -- will be going into second grade next year. And I --

THE COURT: I take it feelings run a little high when it comes to Caterpillar.

MS. McCOSH: No, it's just the spouses get tired of listening to it, you know. It's like--. The only time we talk about it anymore is, oh, we got changed to a different shift or something.

THE COURT: Okay.

MS. McCOSH: And a lot of them are now deceased, so that kind of cuts the chatter down too.

THE COURT: Okay. I'm getting the picture. This organic gardening, is that vegetable or flower?

MS. McCOSH: Used to be vegetables, it became too much work. Now it's flowers. Preferably perennials.

THE COURT: Oh, yeah?

MS. McCOSH: Yeah.

THE COURT: Now, organic means you don't fertilize --

MS. McCOSH: Right.

THE COURT: -- and --

MS. McCOSH: Well, you do, but you use natural fertilizers.

THE COURT: Such as?

MS. McCOSH: Well, one time I raised rabbits. That's a great natural fertilizer.

THE COURT: Oh, yeah. Oh, yes. And what do you do for weed control?

MS. McCOSH: If I can, I get my grandson to help.

THE COURT: With bribery?

MS. McCOSH: Yeah.

THE COURT: Okay. And anyone ever invented anything in your family, or come close to it?

MS. McCOSH: Not that I'm aware of.

THE COURT: Anything about this case that suggests to you that you could not be fair and impartial to both sides?

MS. McCOSH: I don't believe so.

THE COURT: You believe you can give both sides a fair trial?

MS. McCOSH: Yes, sir.

THE COURT: Okay. Juror No. 47, Meegan Wood. Megan.

MS. WOOD: Megan.

THE COURT: Megan, sorry. Tell me about yourself.

MS. WOOD: I am a teacher for District 108 Pekin. I've taught two years. Don't have a husband, don't have any children, not mechanically inclined.

THE COURT: You know you're going to have to learn these things. Now, where are you in college right now?

MS. WOOD: I'm out of college.

THE COURT: Oh, you're out of college.

MS. WOOD: I've taught for two years.

THE COURT: Okay. Anyone been employed at Caterpillar in your family, or close friends?

MS. WOOD: No.

THE COURT: Anyone invented anything or come close to it?

MS. WOOD: No.

THE COURT: Anyone run a business?

MS. WOOD: I have a cousin who restores International tractors.

THE COURT: He owns some stores?

MS. WOOD: No, he just does it privately from his own home, just restores tractors, r-e-s-t-o-r-e-s.

THE COURT: Oh, restores. Oh, restores tractors.

MS. WOOD: Yeah.

THE COURT: Oh. Oh, okay. So he probably knows about fuel injectors.

MS. WOOD: Yes. I don't.

THE COURT: But you don't?

MS. WOOD: No.

THE COURT: Anything about the nature of this case that you think will prevent you from being fair and impartial?

MS. WOOD: No.

THE COURT: You believe you can give both sides a fair trial?

MS. WOOD: Yes.

THE COURT: Juror 49, Terri Hinthorn.

MS. HINTHORN: Yes.

THE COURT: Okay.

MS. HINTHORN: I work for State Farm Insurance in Bloomington, Illinois, and I've been there 13 years. I have two children, 8 and 12. My husband works for Grain Field Incorporated in Heyworth. He's a light mechanic and hauls the heavy equipment to the job sites.

THE COURT: So he -- he drives a big tractor?

MS. HINTHORN: He pulls a long trailer and puts the heavy equipment on, the other cranes and stuff that they need.

THE COURT: And what sort of heavy equipment does he haul around? MS. HINTHORN: Cranes, backhoes.

THE COURT: Oh.

MS. HINTHORN: Tractors.

THE COURT: Does he help set them up too?

MS. HINTHORN: Uh-huh.

THE COURT: And does he have a hobby?

MS. HINTHORN: Riding his motorcycle.

THE COURT: Does he work on his motorcycle too?

MS. HINTHORN: Uh-huh.

THE COURT: Okay. Do you ever help him?

MS. HINTHORN: No.

THE COURT: Do you ride the motorcycle too?

MS. HINTHORN: No, not out of town. I don't like to go too far on it.

THE COURT: But you like to ride. I got to tell you, I want to do that sometime. I want to ride a motorcycle with a woman hanging on to me. I think that's cool. Your husband does too, doesn't he?

MS. HINTHORN: Not all the time. Sometimes he likes to be by himself, too, so --

THE COURT: Oh, does he? I don't know about that. Okay. Anyone ever work for Caterpillar in your family?

MS. HINTHORN: No.

THE COURT: What about inventions or something that --

MS. HINTHORN: No.

THE COURT: Anybody own their own business?

MS. HINTHORN: No.

THE COURT: Anything about this case you think will prevent you from being fair and impartial?

MS. HINTHORN: No.

THE COURT: And you believe you can be fair to both sides?

MS. HINTHORN: Yes, I do.

THE COURT: Okay. We're going to break for lunch, come back at --

MR. STREFF: Your Honor, might I respectfully request the normal admonition be given?

THE COURT: Oh, yes. What is it? Don't discuss the case?

MR. STREFF: That's the one, Your Honor.

THE COURT: Oh, thank you. Yes. Please don't discuss the case among yourselves or allow anyone to discuss it with you, because you don't know anything about the case, really. So talking about it now would be premature, and could be prejudicial, so don't discuss the case. And when you come back, please take your same seats so we know who you are. And we'll try to start back at 1:00. Oh, wait.

Oh, yes, yes. The attorneys have been told by me and they all know that they are not to associate with you. So if you see them, they aren't going to speak with you, they aren't going to be friendly at all, because they're acting on instructions they're not to do that. Because if someone sees them and they don't know, they may think somehow there's some connection. So don't have any contact with the attorneys and they won't have any contact with you.

THE LAW CLERK: Judge, you have a 1:15 telephone call.

THE COURT: Oh. Well, there's going to be a bonus. Apparently I have a 1:15 conference call, so we'll start back at 1:30, give you a little bit more time. Okay? See you then.

THE CLERK: Court's adjourned.

(Jury panel excused.)

(Lunch recess taken.)

* * * * *

(The following proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Okay. Before we start on the rest of the individual questioning, I want to put something to you that I forgot to do earlier. There will be numerous witnesses that will be perhaps testifying in this case, and I have a list of those potential witnesses that I want to read off to you, to see if you know any of these people. Because if you do, my concern is whether or not you would judge their testimony the same as you would judge all other witnesses' testimony. Or whether or not you would treat their testimony differently because you know them. For instance, I know some people I wouldn't believe a word they would say. Other people I know, I would believe them. So, in other words, I'm using a different standard here because I've made my mind up about certain people. So I want to know if you know any of these witnesses and whether or not you would be able to judge their testimony properly. So I'm going to call off the name of these witnesses. They may not all testify, but -- and unless I -- I don't know where they're from, so I can't tell you where they're from.

Joy E. Armstrong. I'm going to need some help on this second one. M-y-l-a-v-a-g-a-n-a-m. Who knows how to pronounce that?

MR. ABRAMS: I can pronounce the last name, Arulraja.

THE COURT: Who can pronounce the first name?

MR. STREFF: Not my job, Your Honor; that's one of his. Would it be helpful if we put it up on the ELMO, where they could see?

THE COURT: It would be. Excellent idea. Excellent idea. You have just initiated a new practice with me, Mr. Streff. From now on during jury selection, I'm going to have the list of witnesses put on the screen.

MR. STREFF: My pleasure, Your Honor.

THE COURT: Thank you. So there you are, members of the -- panel members, a list of the potential witnesses. And when you've had a chance to digest that, I'm going to ask you if you -- any of those names are familiar to you, in any way.

MR. STREFF: And there is another column.

MR. ABRAMS: Right.

THE COURT: Right. Well, we'll take these two columns first. Anyone recognize any of these names? Okay. I see two hands up in the air. And Mr. Ulbricht?

MR. ULBRICHT: Yes.

THE COURT: Okay. Who do you, Juror No. 65, who do you recognize?

MR. ULBRICHT: A.J. Gatzemeyer and Steve Glassey.

THE COURT: H.A. --

MR. ULBRICHT: A.J.

THE COURT: Oh, yes, I see, the first column. And who is that gentleman?

MR. ULBRICHT: It's the head of our Technical Division here, and recently retired.

THE COURT: At Caterpillar, you mean?

MR. ULBRICHT: Yes.

THE COURT: Okay. Did you--. What was your relationship to or with him?

MR. ULBRICHT: I just knew him as a friend.

THE COURT: Oh, he was a friend of yours?

MR. ULBRICHT: Yeah.

THE COURT: Okay. You didn't work under him or anything like that?

MR. ULBRICHT: No.

THE COURT: And what was the extent of your friendship? Off work, were you friends? MR. ULBRICHT: Oh, at work.

THE COURT: At work. Okay. You had no personal friendship with him off work?

MR. ULBRICHT: No.

THE COURT: Okay. And who was the second one?

MR. ULBRICHT: Steve Glassey. He's the head of the Fuel Systems Group.

THE COURT: Oh, I see, okay. Now, what is your understanding of his job? You say head of the Fuel Systems Group.

MR. ULBRICHT: In Engineering.

THE COURT: What did he do? What does that group do?

MR. ULBRICHT: They design fuel systems.

THE COURT: Oh, okay.

MR. ULBRICHT: He was the manager of that group.

THE COURT: So I take it--. Would that group be concerned with fuel injection systems, to your knowledge?

MR. ULBRICHT: Yes.

THE COURT: It would be. Okay. And what's the nature of your relationship? Was it just job-related, again?

MR. ULBRICHT: Yeah, just knew him.

THE COURT: How did you call him, when you met him at work?

MR. ULBRICHT: Steve.

THE COURT: Steve?

MR. ULBRICHT: Yeah.

THE COURT: Okay. All right.

I saw another hand. Yes, sir. Will you please stand.

MR. ALEXANDER: Yes. Ron Alexander, Your Honor. No. 25.

THE COURT: No. 25. Okay. Mr. Alexander, who do you recognize?

MR. ALEXANDER: I recognize the same two names, A.J. Gatzemeyer and Steve Glassey. Just basically a work relation- ship. Never worked with them or under them; just a few names at work.

THE COURT: And I understand you work at Caterpillar.

MR. ALEXANDER: Yes, sir.

THE COURT: I haven't been able to make inquiry yet. What is the nature of your job?

MR. ALEXANDER: Engine design, Mossville.

THE COURT: What division do you work for?

MR. ALEXANDER: Power systems management, power systems marketing. I think right now I'm working with marine engines, primarily.

THE COURT: All right. Thank you, sir.

All right. Let's move to the third column. Anyone recognize any of those names? Oh, I see again --

MR. ULBRICHT: Ulbricht.

THE COURT: Oh, yes, Mr. Ulbricht. Who do you recognize now?

MR. ULBRICHT: Paul Reisdorf, Mark Sommers, Don Western.

THE COURT: And they're all from work?

MR. ULBRICHT: Yeah.

THE COURT: And was your relationship restricted to a work environment?

MR. ULBRICHT: Basically. Did some shooting with Paul out at the gun club.

THE COURT: Any of those your superior, then or now?

MR. ULBRICHT: You mean in terms of I reported to them?

THE COURT: Yes.

MR. ULBRICHT: No.

THE COURT: Okay. Were you on the same level in terms of position at the company as they or were they above you or below you or --

MR. ULBRICHT: They were above me.

THE COURT: Above you. Okay. Are they still above you?

MR. ULBRICHT: Let's see. Reisdorf, I think, retired. Mark Sommers is still above me. Don Western is a VP.

THE COURT: Okay. Do they--. Are th in a position to make judgments about your work?

MR. ULBRICHT: Oh, quite possibly.

THE COURT: Quite possibly?

MR. ULBRICHT: Yes.

THE COURT: Even though you don't report to them?

MR. ULBRICHT: Yeah.

THE COURT: I'm sure I asked you this, but I've forgotten. Were you aware of this case before today?

MR. ULBRICHT: No.

THE COURT: Were you aware of -- not the case, but were you aware of the issue of the controversy involving the fuel injector?

MR. ULBRICHT: No, I was not.

THE COURT: Okay. So this is your first knowledge of any of this?

MR. ULBRICHT: (Nodded head up and down.)

THE COURT: Okay. Okay.

Now, I saw some hands in the back. Please give me your number and your name.

MR. HICKMAN: 67, Geoff Hickman.

THE COURT: Yes. Mr. Hickman, who do you recognize?

MR. HICKMAN: Bob Shelby, the third name down.

THE COURT: Okay.

MR. HICKMAN: When I -- I worked at Caterpillar, when I first went to East Peoria back in, I think it was, '88, Shelby was the factory manager of Building KK. And then from there I think he went to Pontiac fuel systems.

THE COURT: Okay.

MR. HICKMAN: And so I have met him and talked to him a few times.

THE COURT: Okay.

MR. HICKMAN: But nothing recent.

THE COURT: All right. Okay.

Someone else? Yes, sir.

MR. ALEXANDER: Ron Alexander, No. 25.

THE COURT: Yes.

MR. ALEXANDER: Looking down through the list, there are a few familiar names just from passing at work. Paul Reisdorf, Ron Shinogle, Rich Thompson, Don Western. And those are just familiar names from work. I've never worked directly under or with any of those people.

THE COURT: Okay. All right. Thank you.

Now let me ask all three of you this question. And do you feel in any way restrained, restricted or affected in any way by these relationships that you feel some discomfort in sitting on this jury and having to make the decisions that this jury would have to make? (No response.)

THE COURT: And, you know, I'm not trying to question anyone's integrity, but in the real world, things are more complicated than one might want, so this is an opportunity to put it in the position whereby -- you know, you don't have to -- all you have to do is say you feel some discomfort, and that will be the end of it. If not, then I expect you to not let those relationships in any way affect your work on this jury if you are selected.

(No response.)

THE COURT: Okay. I left -- oh, thank you, Mr. Streff. I left off with Juror No. 62, Connie Scott.

MS. SCOTT: Uh-huh. Right here.

THE COURT: Oh, okay. And tell me about yourself, Mrs. Scott.

MS. SCOTT: Okay. I have--. I'm a widow. I've raised three children, and one is a waitress at the Country Club in Macomb and two of them are at Council Bluffs, Iowa. One is a CNA and one's a welder. I worked for Northern Alliance. I'm in the Optical Department, and I order patient frames for 30 offices. But my job was eliminated, so currently --

THE COURT: Could you speak just a little bit louder, please?

MS. SCOTT: So currently I'm unemployed.

THE COURT: Okay. And what do your children do? Well, you told me. Your son is a welder.

MS. SCOTT: One's a CNA.

THE COURT: Yes.

MS. SCOTT: And one's the waitress out at the Country Club in Macomb.

THE COURT: All right. And anyone in your family or close friend ever worked at Caterpillar?

MS. SCOTT: No.

THE COURT: Anyone ever --

MS. SCOTT: No.

THE COURT: -- invented --

MS. SCOTT: I just know one person that works there.

THE COURT: Okay. Is that a relative or a friend?

MS. SCOTT: Friend.

THE COURT: Management or union?

MS. SCOTT: Management.

THE COURT: Okay. How high up?

MS. SCOTT: Not real high.

THE COURT: Would your -- would this affect your ability to be impartial?

MS. SCOTT: No. I don't see him that often.

THE COURT: Okay. Anyone--. Did you ever operate a business? Did you ever have a business? MS. SCOTT: My fiance has a business.

THE COURT: What kind of business does he have?

MS. SCOTT: A barbershop.

THE COURT: Do you keep books for him or work in the barbershop or anything like that?

MS. SCOTT: No, no, not much.

THE COURT: Is there anything about the nature of this lawsuit that you think would prevent you from being fair and impartial?

MS. SCOTT: I don't think so.

THE COURT: Are you mechanically --

MS. SCOTT: I would be fair.

THE COURT: Pardon me?

MS. SCOTT: I would be fair.

THE COURT: Are you mechanically inclined?

MS. SCOTT: No, not really.

THE COURT: Do you know what a fuel injector is?

MS. SCOTT: I've heard of them.

THE COURT: That's about the extent of your knowledge?

MS. SCOTT: Yeah.

THE COURT: And you believe you can give both sides a fair trial?

MS. SCOTT: Uh-huh.

THE COURT: Juror No. 81, Nanette Classon. Clauson. Okay.

MS. CLAUSON: I am married. I'm a respiratory therapist. I worked for approximately 11 years at Saint Francis, and I worked the last five years at Proctor. Job title is Pulmonary Rehab Specialist. My husband is a small business owner. We are incorporated. We're a small corporation.

THE COURT: What does it do?

MS. CLAUSON: Trucking.

THE COURT: Trucking?

MS. CLAUSON: Correct.

THE COURT: Over the road or local?

MS. CLAUSON: Local.

THE COURT: What kind of engine is in his trucks?

MS. CLAUSON: Diesel.

THE COURT: Diesel engine?

MS. CLAUSON: Yes, sir.

THE COURT: Have you ever heard him talk about fuel injectors or anything of that nature?

MS. CLAUSON: Between him and four sons and three of them that are mechanical engineers, I've heard a lot.

THE COURT: Okay.

MS. CLAUSON: Yeah.

THE COURT: And what do your three sons do?

MS. CLAUSON: Actually, I have four. Three of them are mechanical engineers. One is a ceramic engineer.

THE COURT: Are they here locally?

MS. CLAUSON: The ceramic engineer is in Ottawa. One of the mechanical engineers is in Appleton, Wisconsin, and the other two are local.

THE COURT: What does a ceramic engineer do?

MS. CLAUSON: He makes bricks at the present time.

THE COURT: And anyone in your family or close friend employed at Caterpillar?

MS. CLAUSON: One of my sons recently went to work about three months ago for Caterpillar, and another son had probably been to work there for about a year and a half. They are not union. Other than that, we have no other family members --

THE COURT: Okay.

MS. CLAUSON: -- and only a few acquaintances that work there.

THE COURT: Do you feel in any way that would you not be able to be completely fair and impartial because of the Caterpillar connection?

MS. CLAUSON: No, sir, I don't.

THE COURT: Have you been involved with an invention or any idea that someone had that could be patented or copyrighted or trademarked, anything like that?

MS. CLAUSON: I haven't. My husband, years ago, patented a torsion bar suspension thing, but Vietnam came and when he came back it was already an accepted thing.

THE COURT: That's too bad.

MS. CLAUSON: I have a boy in Wisconsin that is looking at several different engine things. What's patented, I don't know.

THE COURT: Now, could you briefly describe the idea your husband had?

MS. CLAUSON: Something to do with holding the cars on the road, making them more stable, especially when they turned. And he kind of got laughed out in a way, but he used to run stock cars and it worked wonderful, and now it's an accepted practice and is in all cars, the design.

THE COURT: Wow. Okay. Was this idea connected in any way with his work at the time or was this something that he had on the side?

MS. CLAUSON: No, he just tinkers and putters and has had the boys underneath hoods of cars and tractors and lawnmowers and everything else ever since they were little.

THE COURT: Okay. Have you had any business experience? I mean by having your own business, anything like that.

MS. CLAUSON: Yes, we have our own business.

THE COURT: And what kind of business is it?

MS. CLAUSON: The trucking.

THE COURT: Oh, you told me that. Where's my head. Now, I take it that you probably have a form contract that you use in the trucking business.

MS. CLAUSON: That's correct.

THE COURT: Did you have any hand in developing this contract?

MS. CLAUSON: Yes, sir.

THE COURT: I take it you talked with the lawyer and made sure it had what in it you wanted.

MS. CLAUSON: Yes, sir.

THE COURT: Have you ever been in a position where you've had to rely upon your contract to settle some type of dispute you've had with a customer or some other supplier or trucking company?

MS. CLAUSON: Not yet.

THE COURT: What did you say?

MS. CLAUSON: Not yet.

THE COURT: Not yet. Okay. Is there anything about this case you think would prevent you from being fair and impartial?

MS. CLAUSON: No.

THE COURT: You believe you can give both sides a fair trial?

MS. CLAUSON: Yes, I do.

THE COURT: Juror No. 44, Cheryl Fischer.

MS. FISCHER: Yes.

THE COURT: Okay, Mrs. Fischer.

MS. FISCHER: I work for State Farm Insurance and I'm in the information technology area. Been there one year. Also, an independent sales consultant for Mary Kay. I don't believe anyone in my family has ever come up with any inventions. My father owns his own business, maybe 15 years ago. It's a grain hauling company.

THE COURT: And did he retire from the business or he just --

MS. FISCHER: No, he just -- he just quit doing it.

THE COURT: Okay.

MS. FISCHER: He's now an operator.

THE COURT: What was he doing otherwise, farming?

MS. FISCHER: Yes.

THE COURT: Okay. And do you have any siblings?

MS. FISCHER: Yes, I have a brother.

THE COURT: What does he do?

MS. FISCHER: He works at -- with aircraft as a database administrator, I believe.

THE COURT: Okay. And is your mother employed outside the home?

MS. FISCHER: Yes, she is a nurse.

THE COURT: And you have any relatives or close friends who work at Caterpillar?

MS. FISCHER: My mother's half-brother retired from there. I believe some cousins on my mom's side also work there currently. And that should be it.

THE COURT: Are they in management or are they in the shop?

MS. FISCHER: I don't know. I only see them about once a year, maybe, so we don't really talk about their jobs.

THE COURT: So if you're on the jury, those relation- ships would not affect your --

MS. FISCHER: No.

THE COURT: -- your work, would it?

MS. FISCHER: No.

THE COURT: Okay. Anyone been inventive in your family, any patents or copyrights, anything like that?

MS. FISCHER: No.

THE COURT: Is there anything about this lawsuit that you think will prevent you from being fair and impartial?

MS. FISCHER: No.

THE COURT: You believe you can give both sides a fair trial?

MS. FISCHER: Yes, I do.

THE COURT: Juror 64 --

MS. YEATER: Yes.

THE COURT: -- Candace Yeater?

MS. YEATER: Very good. Yes.

THE COURT: Oh, thank you.

MS. YEATER: I am a realtor in the Peoria area. I have been for over 20 years. My husband is a family physician, works for OSF in Peoria. No children. As far as inventions, I have a brother-in-law in Houston, Texas, that devised some kind of antipollution device for factories, and he's at a corporation in the Texas area. That's all we have.

THE COURT: Okay. Anyone that's mechanically minded in your family that works on motors or cars, things likes that?

MS. YEATER: My husband does the changing of the oil and all of that, but that's it, nothing else.

THE COURT: Anything about the nature of this case you think would prevent you from being fair and impartial?

MS. YEATER: No, sir.

THE COURT: And do you believe you can give both sides a fair trial?

MS. YEATER: Yes, sir.

THE COURT: Juror No. 17, Linda Marlowe.

MS. MARLOWE: Yes.

THE COURT: Okay.

MS. MARLOWE: I am presently employed at a factory in Princeton called Coil Craft. I have signed a disclosure there, so I cannot give you a lot of details other than I work on machines and we make parts for cellular phones. My husband is employed with Bohrs Industry. He's a graphics designer. He designs the steel decking for different buildings. I have three teenage sons. One's going to be a sophomore at ISU, and one is a senior and sophomore in high school. I--. My husband's cousin has invented some kind of computer chip for John Deere Corporation. I don't know what it is. He is--. I know he has sold back to the John Deere Corporation. We owned an Amway business for about five years, became time consuming, we are no longer in that.

THE COURT: Now, my recollection is Amway does utilize contracts for customers. Is that correct?

MS. MARLOWE: Right.

THE COURT: Have you ever had occasion to get into some type of contract dispute with a customer?

MS. MARLOWE: No. Not with Amway. We also have rental houses that we've had different disputes with court situations.

THE COURT: And have you had litigation result in any way from some of those?

MS. MARLOWE: We have appeared just in small claims court and have one of cases that were presented that we had against our tenants.

THE COURT: Okay. Now, I've -- you're the first time I've heard someone tell me about a disclosure. That means that you have agreed not to reveal to anyone what your company does?

MS. MARLOWE: Correct. We can just give you the basics. And also we -- if we invent anything or come up with any idea, it becomes to the Coil Craft Corporation.

THE COURT: You can't even tell me what you manufacture there?

MS. MARLOWE: Yes. We make conductors, small ceramic conductors, for inside cellular phones.

THE COURT: If I was a suspicious mind, I would say, ah, CIA. That's not true, is it?

MS. MARLOWE: No.

THE COURT: Of course, you would deny it, wouldn't you? You wouldn't tell me yes, would you? Anyone in your family or friend ever worked at Caterpillar?

MS. MARLOWE: I have an acquaintances, but I'm not sure where they work or what they do. I just know they are employed at Caterpillar.

THE COURT: Okay. Is there anything about this lawsuit that you think would prevent you from being fair and impartial to both sides?

MS. MARLOWE: No, there is not.

THE COURT: You believe you can give both sides a fair trial?

MS. MARLOWE: Yes, I do.

THE COURT: No. 9, Janet Webster.

MS. WEBSTER: Yes, sir.

THE COURT: Okay, Mrs. Webster.

MS. WEBSTER: I am a teacher's aid for 5th and 6th academically challenged children at our community school. I'm married. My husband works at -- for the Tube, and he does maintenance there. Which he's also the president of his local union there, the machinist union. We have two children. Our daughter's at Eastern Illinois University and our son is a junior in high school.

THE COURT: Anyone ever worked at Caterpillar?

MS. WEBSTER: I know of people that work there, but they're not close. I mean, no relatives, no close friends.

THE COURT: What about--. Ever been involved with patents or ideas that could be patented, you tried and didn't work or something like that?

MS. WEBSTER: No, I'm not that knowledgeable.

THE COURT: What about mechanical involvement with machines?

MS. WEBSTER: Myself, no, I don't work on cars. My husband fixes minor things with our vehicles.

THE COURT: Uh-huh.

MS. WEBSTER: I have--. My grandparents own, have always owned, an auto parts wrecking business, which they've now passed but my uncles have the business, and they do all kinds of that kind of stuff, but I'm not around it to --

THE COURT: Do you know what a fuel injector is?

MS. WEBSTER: I know they're on vehicles, but that's as far as I know about them.

THE COURT: Okay. Have you ever had a business or anyone in your family ever had their own business?

MS. WEBSTER: My father had a trucking business, but he's been retired from that since '74. Other than that, my grandparents.

THE COURT: Anything about this case you think would prevent you from being fair and impartial?

MS. WEBSTER: Nothing that I can see.

THE COURT: You believe you can be fair to both sides?

MS. WEBSTER: Yes, I do.

THE COURT: Juror No. 82, Kurt Hobart.

MR. HOBART: Uh-huh.

THE COURT: Okay, Mr. Hobart, tell me about yourself.

MR. HOBART: I work for Nussman Plumbing and Heating out of Fairbury. I've been a plumber for 24 years. My wife is a secretary at Great Cook Ware in Fairbury. My two boys, one 12 and one 15, they both participate in sports and are in a traveling baseball league right now. And basketball.

THE COURT: What position do they play?

MR. HOBART: A little of everything. Third base, first base, pitch.

THE COURT: Who said that they would rather be a pitcher than a catcher? Who was that? Was that you?

MR. MILLER: Yes, it was.

THE COURT: You know what I just learned during the noon hour? You know the one position where there's been more baseball managers coming from?

MR. MILLER: Pitching.

THE COURT: No. Guess again.

MR. MILLER: Catching.

THE COURT: That's right. That's right. So, you know --

MR. MILLER: Well, you never know.

THE COURT: -- Mr. Hobart, you might want to tell your boys to be a little bit more attentive to the catching position.

MR. HOBART: I also help coach my younger boys. On the team.

THE COURT: Okay. And anyone in your family, close friends, ever worked at Caterpillar?

MR. HOBART: I have relatives that have retired and I have a few that -- a couple of that work there now, and I have quite a few friends that work there also.

THE COURT: Both in management and in the shop?

MR. HOBART: Yes.

THE COURT: Okay. Do you feel that those relation- ships would in any way prevent you from being fair and impartial?

MR. HOBART: No.

THE COURT: Anyone in your family or close friends run their own business?

MR. HOBART: My father-in-law has a tire and alignment business, in Chatsworth.

THE COURT: Anyone ever invented anything or had something copyrighted or patented or anything like that?

MR. HOBART: Not that I'm aware of.

THE COURT: Anything about this case you think would prevent you from being fair and impartial?

MR. HOBART: No.

THE COURT: You believe you can be fair to both sides?

MR. HOBART: Yes.

THE COURT: Juror No. 15, Lori Lawless. Where are you, Lori?

MS. LAWLESS: Right here.

THE COURT: Oh, okay. Okay, please.

MS. LAWLESS: I'm married, I have three children. I have twin boys that are 20, one is at the U of I and the other one is at ISU, and I have a daughter that's 14 that just finished 8th grade. And I work for a chiropractic office. I'm the office manager. And my husband works for Golden Harvest. He is a seed agronomist.

THE COURT: Did you say Golden Harvest?

MS. LAWLESS: Yes.

THE COURT: Do you know much about Golden Harvest?

MS. LAWLESS: It's a seed company. It covers several states.

THE COURT: Yes.

MS. LAWLESS: He just started with them in January. Prior to that, he was with GroMark for 19 years.

THE COURT: Okay. Is your--. I take it they're trying to come up with the perfect seed -- is it corn seed we're talking about?

MS. LAWLESS: Yeah, corn and beans.

THE COURT: Okay. Corn and bean seeds?

MS. LAWLESS: Yeah.

THE COURT: Okay. And anyone worked at Caterpillar?

MS. LAWLESS: No.

THE COURT: Anyone been involved with any invention or patents or copyrights or trademarks, anything of that nature?

MS. LAWLESS: No, not that I know.

THE COURT: Anyone mechanically involved, motors and cars, things like that, in the family?

MS. LAWLESS: Yeah. My dad's retired. He owned his own gas station when I was grade-school age. He went to Kraft Foods, head mechanic up there for 30 years, which he is now retired. And my father-in-law was the mechanic at John Deere for 35 years, and he's retired now.

THE COURT: And what about you?

MS. LAWLESS: I just talk to my husband when he's out working on the vehicles, so I don't really -- I hear the words, but I'm not real familiar with what they do.

THE COURT: You've heard of fuel injector before?

MS. LAWLESS: Yes, I have.

THE COURT: Do you know what it is?

MS. LAWLESS: Yes.

THE COURT: Okay. Is there anything about this case that you think would prevent you from being fair and impartial?

MS. LAWLESS: No, there is not.

THE COURT: You believe you can give both sides a fair trial?

MS. LAWLESS: Yes, I can.

THE COURT: 39, Richard Wagers.

MR. WAGERS: Wagers.

THE COURT: Wagers.

MR. WAGERS: Yeah. I'm retired, my wife and I are. I'm married, both of us are retired. We worked for GE in Bloomington. I worked there for 42 years, my wife worked there 20-some. We were both members of the union there at Bloomington. We have four children. One boy that's in Billings, Montana, that's an archeologist; two that work at Bloomington State Farm; and one boy that works at Mitsubishi. I have a brother-in-law that works at Caterpillar in Pontiac. He was very active. He was in the union as a negotiator, but he's -- through a medical problem he's now in management, and I think he is working on the fuel injector design. At -- at Pontiac, in Pontiac.

THE COURT: What makes you think that?

MR. WAGERS: Well, he talks about the fuel injectors --

THE COURT: Okay.

MR. WAGERS: -- quite a bit.

THE COURT: All right.

MR. WAGERS: And he's in tool design there now.

THE COURT: So when I read off what this case was about, it struck a valve with you.

MR. WAGERS: Yes.

THE COURT: And do you know much more than what I told you here today?

MR. WAGERS: Not a lot, no.

THE COURT: Do you know anything about this dispute between these parties?

MR. WAGERS: No.

THE COURT: Has it ever been mentioned by your --

MR. WAGERS: Brother-in-law.

THE COURT: -- by your brother-in-law?

MR. WAGERS: No. And I have a grandson that is with -- working with Caterpillar now here in Peoria.

THE COURT: Now, because of these relationships, do you feel comfortable sitting on this jury where you have to be impartial and to decide this case fairly without bias toward or for Caterpillar or against them?

MR. WAGERS: Yes, I think so.

THE COURT: You believe you can give a fair trial to both sides?

MR. WAGERS: Yes.

THE COURT: Tell me about the metal detection club.

MR. WAGERS: Well, I belong to a metal detector club there in Bloomington and I do competitive metal detecting, which is any metal that's in the ground --

THE COURT: How do you compete?

MR. WAGERS: Well, they have competition hunts all over the country here now.

THE COURT: Uh-huh.

MR. WAGERS: And it's an entry fee, you pay to get in, and they put stuff in the ground.

THE COURT: Uh-huh.

MR. WAGERS: And I do that possibly on the average of 12, maybe 15 weekends a year.

THE COURT: Wow. Is there a trick to it, or secret, or just how fast you walk?

MR. WAGERS: Be fast.

THE COURT: Is that the secret?

MR. WAGERS: Yes.

THE COURT: You just cover a lot of ground.

MR. WAGERS: Yes.

THE COURT: Can you do anything about your equipment to make it more sensitive?

MR. WAGERS: Yes, yeah. It has--. You can eliminate -- you can discriminate out a lot of different things.

THE COURT: Interesting.

MR. WAGERS: We do that anywhere from Texas to Wisconsin.

THE COURT: And what type of metals are found?

MR. WAGERS: Well, in the -- in this competition stuff, pert'near it's all silver. Silver dimes, silver quarters, silver dollars.

THE COURT: Do you have any knowledge of magnets or any type of magnetic metals?

MR. WAGERS: Yes, some. I worked with that at GE to some degree. I was a technician there and we -- on automated equipment we used some of that stuff.

THE COURT: Can you just briefly describe to me how you use magnets at GE?

MR. WAGERS: Some of the--. Pick up different--. Like the robots would come around and pick up a metal and bring it and -- and they would just drop it off. Pick and place units.

THE COURT: Did you have any schooling in metals and their properties by the company in connection with your job? Did they --

MR. WAGERS: No.

THE COURT: No?

MR. WAGERS: Most of it was electronic.

THE COURT: Is there anything about this case you think would prevent you from being fair and impartial?

MR. WAGERS: No.

THE COURT: And do you believe you can give both sides a fair trial?

MR. WAGERS: Yes.

THE COURT: All right. Juror No. 67, Geoffrey Hickman. Mr. Hickman, where are you?

MR. HICKMAN: Right here.

THE COURT: Oh, there you are, yes. Please tell me about yourself.

MR. HICKMAN: I have -- I've been employed by Caterpillar for the past twenty-nine and a half years. I started off the first five years as hourly. Two of those years were in Mossville Division as far as assembler. I've had eight years at salary and 16 years as management. Currently, Senior Quality Engineer working with purchase-based suppliers. As far as family, my older brother, dad and grandfather all worked and retired from Caterpillar. My wife and I have a boy that is finishing his internship --

THE COURT: At Caterpillar?

MR. HICKMAN: -- for the IS group. He'll be a junior this fall at the U of I. As far as patents, I know a few people in the transmission group that hold patents. Small businesses, no. Let's see. Oh, my wife is a tech at Midwest Kidney here in East Peoria, or over in East Peoria.

THE COURT: As they say, you're yellow through and through, huh?

MR. HICKMAN: Pretty much.

THE COURT: Do you feel comfortable sitting on this jury?

MR. HICKMAN: I can be fair. The job I currently have with purchasing suppliers, it's sometimes defending them and obviously sometimes not. But sometimes we're wrong, sometimes they're wrong.

THE COURT: And if under the law and the evidence it's suggested a verdict against Caterpillar, could you do that?

MR. HICKMAN: Yes.

THE COURT: Or, likewise, if it suggests a verdict for Caterpillar, you could do that too, I assume.

MR. HICKMAN: Yes.

THE COURT: Is there anything about this lawsuit that causes you any pause in your feeling about whether or not you should be on this jury?

MR. HICKMAN: Just the three to four weeks.

THE COURT: Ah.

MR. HICKMAN: Obviously, that's the main one right there.

THE COURT: Yes, I can understand that. But you're going to love it. Once we get into it.

MR. HICKMAN: Yes, of course.

THE COURT: You're going to love it. So you believe you can be fair to both sides?

MR. HICKMAN: Yes.

THE COURT: Let me just pause to tell you folks--you're going to hear it later anyway--something profound happens in a jury trial in this court. Over the course of these three weeks, you're going to find that these strangers are going to become pretty special to you. You're going to have something in common. I can't think of anything more noble

as to have twelve strangers--in this case, ten strangers--whose only job is to decide a case fairly and impartially. I mean, that's -- that's good stuff and I think it's worth the sacrifice, and I hope that you feel the same way when this is over.

Okay. Juror No. 83, Owen Smith.

MR. SMITH: Hello.

THE COURT: And Mr. Smith, tell me about yourself.

MR. SMITH: I'm 39 years old. I'm married, have two children. I work for Wal-Mart. I'm an assembler. I put together bicycles, barbecue grill, patio furniture, basically whatever they need built.

THE COURT: Let me ask you this right now. I can never forget Christmas Eve night trying to put together things I get from stores and there's a screw missing or a hole that won't match up. Do you have the same problem?

MR. SMITH: Yeah, sometimes we do.

THE COURT: And what do you do?

MR. SMITH: Depending on what the part is, if it's a small nut, bolt, we'll just go get that from our Hardware Department. Last week we opened a bicycle box, the front wheel was missing. So in that case you have to order the part from the company and they'll send it to you.

THE COURT: Okay.

MR. SMITH: My wife, she works part-time for the post office in Edwards. She is a -- a postmaster relief. My daughter just turned 12 on the 9th; she's going into 7th grade this year. My son will be going to 4th grade; he turns 10 on Christmas Eve, so that's a nice Christmas present.

THE COURT: Yes.

MR. SMITH: My father-in-law and mother-in-law owned a hardware business back in the '60s and '70s. My

father retired from Sears in the mid '80s, and then he bought and operated a small engine repair shop from the mid '80s to the mid '90s, which I worked at part-time. I do mechanic work. I work on engines, replacing parts. Haven't got real deep into the guts of the motor, but lots of, you know, external starters and alternators, water pumps, power steering pumps.

THE COURT: So you know what a fuel injector is.

MR. SMITH: Yes. I've never worked on one, but I've worked on engines that have it.

THE COURT: Okay. Anyone ever been employed with Caterpillar in your family, or close friends?

MR. SMITH: I have an uncle who was employed. He's been retired for about ten years from the Mossville plant.

THE COURT: Uh-huh.

MR. SMITH: I'm not exactly sure what he did there. We never really talked about it.

THE COURT: Okay. Is there anything about this case that you think would prevent you from being fair and impartial?

MR. SMITH: No.

THE COURT: You believe you can be fair to both sides?

MR. SMITH: Oh, yes.

THE COURT: Okay. We're down to two here. No. 25, Ronald Alexander.

MR. ALEXANDER: Yes, sir. Ron Alexander. I am married, have two children. Son is 21. He's currently at home, going to school. My daughter, 25 --

THE COURT: Did something happen to the sound?

THE CLERK: The battery may be --

THE COURT: I thought maybe you were going into your seductive voice here. You got real low. Why don't you start over.

MR. ALEXANDER: As I was saying, I am married. My wife is a full-time homemaker. She's been a stay-at-home mom since my daughter was born 25 years ago. My daughter is living in Seattle now. She works for the Seattle Chamber of Commerce at some sort of -- I'm not just sure what it is she does for them. But my son is 21; he still stays at home, still going to school. I've been employed at Caterpillar 29 years. My entire career has been at the Mossville facility in the engine plant, working strictly -- always been in the office, started out as a draftsman and worked my way up.

THE COURT: Were you familiar with this lawsuit before today?

MR. ALEXANDER: No, sir, not at all.

THE COURT: Or with the controversy, or dispute, or whatever you want to call it.

MR. ALEXANDER: No. The fuel system has always been a separate entity in its own little world, and the areas I have worked in is mostly core iron or most the basic engine, so not at all to do with the fuel systems.

THE COURT: I know you are one of the persons who were acquainted with various potential witnesses who happened to be or were employees of Caterpillar. Do you have any discomfort being on this jury in light of those relationships?

MR. ALEXANDER: No, I don't. I said the names that I saw were just names that were familiar through work. I've never really been close friends or nothing in the way of a personal relationship with anybody, and I've never had any of

those people as my direct superiors at any point in my career. Just familiar names from work.

THE COURT: And if under the law and the evidence it would appear appropriate to have a verdict against Caterpillar, could you do that?

MR. ALEXANDER: Yes, I could. And Caterpillar is a responsible community -- partner in the community, and it goes both ways.

THE COURT: All right. So you could be fair to both sides? MR. ALEXANDER: Yes, I could, Your Honor.

THE COURT: And the last shall be first. No. 42, Andrew --

MR. VLACHOS: Vlachos, Your Honor.

THE COURT: I was going to say that. Tell me about yourself, Mr. Vlachos.

MR. VLACHOS: I'm 22 years old and single. I'm a Bradley University student double majoring in philosophy and political science. I hold public office in Bartonville. As far as Caterpillar goes, my maternal grandmother worked there for a number of years. I think maybe some great uncles on my mother's side. When I was a small child, my father was a physician there. I never really discussed Caterpillar, nor would I if I was selected for this jury.

THE COURT: Are you mechanically minded?

MR. VLACHOS: I could probably find a fuel injector on my truck, you know, if I needed to, but other than that I really wouldn't know what to do with them.

THE COURT: You know, you're the first philosophy major I've met on jury.

MR. VLACHOS: I've always -- is it -- okay, sorry. I've got an interest in the law, so it was kind of a prelaw

thing, but I've always had sort of an interest in philosophy and things to do with that.

THE COURT: Anyone in your family ever invented anything or been involved with some invention, or some copyright or trademark, anything like that?

MR. VLACHOS: Not to my knowledge, Your Honor.

THE COURT: Anyone operate a business, their own business?

MR. VLACHOS: No.

THE COURT: Anything about this lawsuit you think would prevent you from being fair and impartial?

MR. VLACHOS: Not at all, Your Honor.

THE COURT: You believe you can give both sides a fair trial?

MR. VLACHOS: Yes.

THE COURT: Okay. I have exhausted my part of this, but now I'm going to give the lawyers a chance to ask you questions. And I will give each side ten minutes. That may not seem very long, but actually in ten years I've never had but one lawyer use more than ten minutes. And if you feel you must go over that, just check with me and I'll be reasonable. Then after the lawyers ask you questions, we will then go to the side and select the jury out of your hearing, so you won't know who is selecting who. And I forgot to mention it to you, but each side can excuse a member without giving a reason. We call these peremptory challenges, and they have a number of these. This recognizes the real life situation that we make judgments about people every day: I like that person, but I can't tell you why I like them. Or I don't like that person. I can't tell you why I don't like them, I just have a feeling. We just don't connect. Well, the law recognizes this is the way we operate, so each side

has challenges where they can say I -- I don't want that one and they don't have to give me a reason.

In addition to those, you can be excused for a reason; a reason that suggests to me there's something about you where for this particular case you would not be an appropriate juror. So you can be excused for cause or you can be excused on what we call a peremptory challenge. So once we get through with the questions by the lawyers, we will select you by excusing you until we get down to the ten that remain to be the jury.

So, Plaintiff, Mr. Abrams, you may.

MR. ABRAMS: Thank you, Your Honor. Good afternoon, ladies and gentlemen. Again, I'm Bob Abrams. It's a pleasure to have you serve for this jury. I can assure you and the Court that I will not need more than ten minutes because of the thoroughness, frankly, of the Court's voir dire of all of you. But I have a few questions, general questions, and then some specific questions.

We've all been here in this process since 9:30 or 10:00 this morning, and that's given all of you the opportunity to reflect on this case. A little bit, I understand, but you know that Caterpillar is clearly the Plaintiff in this case. And Caterpillar has prominence in this community. It has influence in this community. We all know that. It contributes to the community, but that and --

MR. STREFF: Your Honor, can we approach, please? I thought opening statement was going to come after the jury was selected.

THE COURT: Yes. This was supposed to be questions.

MR. ABRAMS: Your Honor --

THE COURT: I suspect--. That was brief --

MR. ABRAMS: Yes, it was, Your Honor.

THE COURT: -- and I presume it's over with now.

MR. ABRAMS: And, ladies and gentlemen, I would just like you to reflect on it and tell me whether there's anyone that believes that Caterpillar simply wields too much influence in this community and that would affect your judgment or partiality or bias in this case. And if anybody over this time has come to that conclusion or has that thought, I would appreciate it if you'd raise your hand for me.

(No response.)

MR. ABRAMS: Not seeing any hands, I appreciate that.

I'd also like--. And the judge did touch on this. Whether anyone here has had a dispute with a corporation or an officer of the corporation.

(No response.)

MR. ABRAMS: Okay. I'd like to focus--and I hope I'm not going to pick on anybody--but I have a few specific questions. Mrs. Rosiak?

MS. ROSIAK: Yes.

MR. ABRAMS: You, I believe, told me that your husband is a welder and works with transmissions at Caterpillar.

MS. ROSIAK: Well, he was a welder. He still -- he sands out parts and things now from an injury he had while he --

MR. ABRAMS: Does -- did your husband like working at Caterpillar?

MS. ROSIAK: Yes, he did.

MR. ABRAMS: Mrs. Silldorff, again my notes reflect that your husband worked at Caterpillar.

MS. SILLDORFF: Right.

MR. ABRAMS: And did he have good relationship with Caterpillar?

MS. SILLDORFF: Yes, he did.

MR. ABRAMS: And you live in Woodford County?

MS. SILLDORFF: Yes, I do.

MR. ABRAMS: Where do you live in Woodford County?

MS. SILLDORFF: We live in Metamora.

MR. ABRAMS: All right. And Mrs. Humphrey?

MS. HUMPHREY: Yes.

MR. ABRAMS: I believe your husband has a job at Gates Rubber.

MS. HUMPHREY: Yes.

MR. ABRAMS: And how is that job going?

MS. HUMPHREY: Well, it's kind of sad, because they are going to close the door, you know, but there's no ill feelings. He's been employed there, or will be in November, 35 years, and we've been very happy. They've been fair to us.

MR. ABRAMS: Thank you. Mrs. Campbell?

MS. CAMPBELL: Uh-huh.

MR. ABRAMS: You are a co-owner -- I believe my notes say you are co-owner of CNS Direct Advertising.

MS. CAMPBELL: My husband owns the company, right.

MR. ABRAMS: Who are the clients?

MS. CAMPBELL: Oh, gosh. Little and big, everybody. State Farm.

MR. ABRAMS: And how's --

MS. CAMPBELL: Small companies, big companies.

MR. ABRAMS: And how's the business going?

MS. CAMPBELL: Pretty well.

MR. ABRAMS: Okay. Thank you very much.

MS. CAMPBELL: Uh-huh.

MR. ABRAMS: Hester McCosh?

MS. McCOSH: McCosh.

MR. ABRAMS: Thank you. And you worked at Caterpillar 28 years?

MS. McCOSH: Uh-huh.

MR. ABRAMS: Have you had a good job experience at Caterpillar?

MS. McCOSH: Yeah. Looking forward to retirement.

MR. ABRAMS: Aren't we all. Aren't we all. But you've had a good job experience and no issues with Caterpillar?

MS. McCOSH: No, nothing that we couldn't get past.

MR. ABRAMS: Okay. And you can be fair and impartial to Caterpillar?

MS. McCOSH: I think so.

MR. ABRAMS: Thank you very much.

Miss Wood, what -- I know you're a teacher. What is it that you teach?

MS. WOOD: I teach third grade.

MR. ABRAMS: Sorry?

MS. WOOD: Third grade.

MR. ABRAMS: Oh, third grade. I remember third grade, although it's a long time ago. Thank you.

THE COURT: I wouldn't mind being in the third grade again.

MR. ABRAMS: I wouldn't either. Especially knowing what we know now.

THE COURT: I was thinking about the teacher.

MR. ABRAMS: I can't top that one. I couldn't have said that one, either, without getting -- Mr. Wagers.

MR. WAGERS: Yeah.

MR. ABRAMS: Could you tell me a little bit more about the engineering you do at GE?

MR. WAGERS: I was a tech there. We took care of the automated lines, where they ran the lines down the robots, pick and place units, and the job I had was basically keeping those running, whether mechanical or electrical, and I done that for the last, probably, ten years I was there.

MR. ABRAMS: Do you have a degree in engineering?

MR. WAGERS: No.

MR. ABRAMS: But you know how machines work, basically.

MR. WAGERS: Yes. Well, we build them from scratch. We started out--. They design them and we build them from the bottom up.

MR. ABRAMS: I thank you all. Those are my questions. Thank you, Your Honor.

THE COURT: Thank you, Mr. Abrams.

Mr. Streff.

MR. STREFF: I will also try to be brief, Your Honor. And let me start back there, since the microphone seems to be back there. Mr. Wagers, when you were building those machines, you say, from scratch, did you have schematics or sketches that people would use?

MR. WAGERS: Yes. The engineers would bring them up and start from scratch.

MR. STREFF: And they would just scratch them out on a piece of paper and it gets more complex, yes?

MR. WAGERS: Yes. They'd do the electrical, the mechanical and all that.

MR. STREFF: Did you do some of the actual building?

MR. WAGERS: Yes, the electrical parts.

MR. STREFF: And did you build them from the original sketches or have to get more detailed drawings as they progressed?

MR. WAGERS: Well, kind of a hit-and-miss deal. Once we got them so far, then they would kind of change them, then go from there.

MR. STREFF: Let me ask you to pass the microphone down to Mr. Hobart, please. Let me just fill in a quick blank in my notes. I believe you said that you have relatives that were at Cat that retired, some were there now, and then some friends. Are these--. The relatives that are there now, can you tell us just generally where they're at?

MR. HOBART: She is in the office in Aurora, and I don't see her hardly at all.

MR. STREFF: And how about the ones that retired?

MR. HOBART: They're in Florida.

MR. STREFF: That's a good place. When they were at Cat, what did they do?

MR. HOBART: They were in Office 2. One of my uncles. I think it was union.

MR. STREFF: And then were any of them involved in fuel injections or fuel assembly?

MR. HOBART: I couldn't tell you. I don't know.

MR. STREFF: And the friends that you have at Cat now, where do they work, if you know?

MR. HOBART: Pontiac.

MR. STREFF: And they work in fuel systems, then?

MR. HOBART: I don't know.

MR. STREFF: Are these close friends?

MR. HOBART: One of them -- one of -- the one that is in management, he helps on the baseball. And one was a friend in high school, that's all.

MR. STREFF: Thank you. Could I ask you to pass the microphone, please, to Mrs. Silldorff.

I believe you told us that your husband retired from Cat. How many years had he worked there?

MS. SILLDORFF: Thirty-one and a half years.

MR. STREFF: And what had he done specifically through those years, if you recall?

MS. SILLDORFF: He'd been -- he worked on the assembly for a while, but then he went into the apprentice course and he became an electrician.

MR. STREFF: And what type of electrical work did he do at Cat?

MS. SILLDORFF: I don't know.

MR. STREFF: I'll let you pass the mic on that one, to the person sitting next -- let's see -- Mrs. Humphrey. I'm sorry, there seems to be a pattern here. The closing of your

husband's plant, did any of the products that he -- that that plant made, any of those get sold to local companies like Caterpillar?

MS. HUMPHREY: Not to my knowledge, no.

MR. STREFF: Would you pass the microphone down, please, to Mrs. Adams-Trantham. I hope I got that correct.

MS. ADAMS-TRANTHAM **[Juror No. 3]:** Yes.

MR. STREFF: Thank you. I believe that you told us, if my notes are correct, that your husband is a union employee of Caterpillar.

MS. ADAMS-TRANTHAM: That's correct.

MR. STREFF: What does he do there?

MS. ADAMS-TRANTHAM: He's an assembler.

MR. STREFF: And which of the many Caterpillar products does he assemble?

MS. ADAMS-TRANTHAM: I don't know.

MR. STREFF: What plant?

MS. ADAMS-TRANTHAM: Mapleton.

MR. STREFF: I'm sorry, I don't mean to put you on the spot.

MS. ADAMS-TRANTHAM: Mapleton.

MR. STREFF: Nothing to do with Pontiac or fuel injectors?

MS. ADAMS-TRANTHAM: No.

MR. STREFF: Great. Two final questions, one for Ms. Wood. Can you tell us where you went to college?

MS. WOOD: Illinois State University.

MR. STREFF: Thank you.

And last one for Mrs. Hinthorn. In the context of the work that you do at State Farm, are you looking at policies and contract language or are you far away from that?

MS. HINTHORN: I work with auto and we do underwriting of auto applications.

MR. STREFF: And does that involve having to parse out language of lawyer-like agreements, or you get to stay away from that?

MS. HINTHORN: No, I stay away from that.

MR. STREFF: Great. Thank you very much, Your Honor.

THE COURT: Thank you.

Okay. I'll give the lawyers a minute or so to get your thoughts together, and I'll try to entertain the people in the meantime. I feel the pressure. So, briefly, I'll tell you, because I know you want to know how tall I am: I'm 6 feet 6 inches tall. And as someone said, I did play basketball at Bradley back in the '50s, when they had a good team, and maybe those days will happen again. I hope so.

MR. MILLER: They're looking for a coach.

THE COURT: Who said that? Oh. Well, let's not bring that up.

And I'm one of the two federal judges that sit here in Peoria--Judge Mihm is also here--and we also go to Rock Island. We have a courthouse there. We also have a courthouse in Springfield, and one in Urbana. So there are four courthouses in our district. We're part of the Central District, which covers all the territory south of I-80 down to Springfield. That's why we call it the Central District. The Northern District is everything north of I-80, and the Southern District is everything south of Springfield, so we -- and from Iowa to Indiana, so we cover a large area.

And I have four children--the youngest is 31--and among them is a lawyer, a doctor, a teacher and a salesman. And my wife also is a judge. She -- I hope you voted for her, but she's on the Appellate Court, and that sits in Ottawa. That covers this area too.

And I don't dance, but I do sing. And I think the lawyers should be ready now -- I tell you what. I've been directed to allow you to have a break, before we get back into selection, so let's do that. Why don't you have a break and then come back and resume the same seats, because we're almost done with this. As soon as you come back we will select you and we'll be almost done with this part of the trial. So let's take a break now.

THE CLERK: Court's in recess.

(Jury panel excused.)

(Brief recess taken.)

(The following proceedings were held in the presence and hearing of the jury panel.)

THE COURT: Okay. I'll meet with the lawyers at the sidebar and we'll select the jury.

(The following sidebar conference was held out of the hearing of the jury panel.)

THE COURT: Okay. Mr. Abrams, you go first.

MR. STREFF: Your Honor, can we do challenges for cause? THE COURT: Yes, thank you. Damn it, I lost my head. Any challenges for cause?

MR. STREFF: Just a few, Your Honor.

MR. ABRAMS: No, we don't have challenges for cause.

MR. STREFF: Your Honor, as you might suspect, we have some significant challenges for cause. I think they fall into two categories. One is current employees or retirees

from Caterpillar, who have, if I have a written down correctly, 29.5 years, three decades, of their lives working for an opposing party. The other categories are those who are related to, and closely related to, be they husbands, or, in some cases sons who are currently working for Caterpillar. And therefore we believe that it would be not just highly prejudicial, but it would be grounds for a mistrial to allow those people who are so closely tied to the company category to be members of the jury. And we have a list of 11 people. And you may want to go through them in detail, since we all have our notes, and it may be better to do it somewhat where we are not standing around the microphone, if that's a problem.

THE COURT: Yeah, I agree. I think--. Why don't we do this in my chambers. Okay.

(The following proceedings were held in the presence and hearing of the jury panel.)

THE COURT: There's going to be a need to maybe have some extended discussion during this process, and I think it would be more comfortable for us if we were able to sit down, so I'm going to go in chambers with the court reporter while we hear some motions, and then I will be back. You don't have to sit here. If you wish to walk around, fine, just maybe check in in 20 minutes to see if we're ready to resume. Or if you want to sit in here, you can. But feel free to leave the courtroom if you wish.

(The following proceedings were held in chambers,

out of the presence of the jury panel.)

THE COURT: Okay, Mr. Streff. You've made a motion that the Court strike for cause all retirees or spouses of retirees. Is that correct?

MR. STREFF: And current employees.

THE COURT: And current employees. Okay.

MR. ABRAMS: Your Honor, may I respond to that?

THE COURT: Uh-huh. Just let me get this down first. Okay. Retirees or spouses of retirees, or current employees.

MR. STREFF: (Nodded head up and down.)

THE COURT: Okay.

MR. STEADMAN: Spouses of current employees. And spouses of current employees.

THE COURT: Oh, and spouses of current employees. Okay. Mr. Abrams?

MR. ABRAMS: Your Honor, it's our position that there is no basis for cause challenge as Mr. Streff has articulated it. This jury is supposed to be representative of this community. And this community is composed of people that have relationships and ties with Caterpillar. Your Honor had an incredibly thorough voir dire. The people that you voir dired said they could be fair, except those that you ferreted out, who have left, and there were certain people that did leave because they said they could not be fair. And that is the bias that was there.

There's a person who is sitting in this jury--it's No. 61-- he applied for a job with Caterpillar and he was refused employment. I don't--. That wouldn't be a cause challenge unless this kind of approach took place. You know, just because you work for a company, Your Honor, doesn't mean also that you have positive feelings for that company. You know. And it's common sense that you could work--and that's why I asked the questions or some of the questions I did--you could work for a company and really not be pleased and be upset and irritated with the company.

Furthermore, Your Honor, Your Honor has given five peremptories already to Mr. Streff. And while, with all due respect to the Court, you know, we objected to that and it was

from our perspective unfair, but he has five peremptories. You've made that ruling.

And, finally, I want to say if he thought this venue wasn't fair, there's a procedure for that. He could have moved to change the venue. Because what he's really doing now is in effect seeking to exclude and make this a jury that is not representative of this community. There's a procedure in the rules for doing it; this is not it. This is an unfair approach.

THE COURT: Okay. Did you want to put your argument in the record, Mr. Streff?

MR. STREFF: Yes, please, Your Honor. As I stated when we were standing outside and hopefully was picked up -- well, let me start from the beginning here. It is not appropriate or fair to have people whose livelihood, whose dollars, come from the opposing party and have them sit on the jury. And I will agree with Mr. Abrams. Your Honor, as you did in our prior trial, did a wonderful job on voir dire and asked them all the right questions. I suggest, Your Honor, that the pressure of sitting in that seat, being in this court, hearing very appropriately the sanctity of this activity in which we are engaging, precipitates no other answer than, yes, I will be impartial. However, when someone has received a paycheck from a company for 30 years--I think some of twenty-nine and a half, but some of 30 years--three decades, I don't care whether there's been ups or downs or Mr. Abrams can get them to say, yes, I've been treated wonderfully by Caterpillar, as one person said. It is just inappropriate to put people in that position, and I don't believe that they can truly be fair in their own minds. That goes to spouses especially, because their husbands have lived through it, or wives have lived through it. And in that sense, I don't -- I'm not under a requirement to move to change venue when I know that challenges for cause are extremely appropriate, and the last jury pool we got did not have

anywhere nearly as many of these people.. This is not a scientific study. You send out, you get people who show up, you get people who don't show up. This group happens to be heavily populated with people whose relationships with the opposing party are 29 to 30 years, almost to the person. And in that regard, Mr. Abrams is going to stand up in front of them and ask them for an awful lot of money that could eventually be contributed to the community or otherwise contributed to union negotiations for wages. So in all of that regard, it is extremely unfair and biased. I'm not suggesting we move to Moline and do this again, but I am suggesting unless these 11 people--and there are two others that have close relatives who are sons; we are talking right now about the spouses and employees and retirees and spouses--unless these 11 people are taken out of this situation, we believe we will be severely prejudiced. Because it is extremely difficult for folks, no matter how hard they may try and want to, to remove the fact that the money that has put bread on their table has come from Caterpillar, and Caterpillar is seeking money in this lawsuit from another party.

MR. ABRAMS: May I make a comment, Your Honor?

THE COURT: All right.

MR. ABRAMS: Your Honor, very simply, no basis to believe these people are not telling you the truth, when they say they could be fair and impartial. And what Mr. Streff is suggesting here is no different than a Batson situation. Your Honor, they're trying to exclude a class of people, and the class of people here is anybody having a relationship with Caterpillar. It's not a fair approach. It is not the repre- sentation of this community. That's what this court is all about. I've said my piece.

THE COURT: All right. You want to say anything else, Mr. Streff? MR. STREFF: No, Your Honor.

THE COURT: Okay. You both make points with me. Caterpillar is an important part of this community, and it would not be a representative community without some Caterpillar connection. By the same token, I can appreciate that employment with Caterpillar could certainly cause persons getting their paycheck from Caterpillar to be a little bit predisposed. So I will not grant this motion in total as requested by Mr. Streff. But I think I do feel that there may be one category of people that I might exclude. And give me a moment to confer with my law clerk. I'll be right back.

(Brief recess taken.)

THE COURT: Okay. There is one group of potential jurors that I will exclude because of their status. And that's what Mr. Streff is asking me to do, to exclude people simply because of their status and not because of any feel I have, based on the voir dire, as to whether or not they can be fair and impartial. This group will be those who identified potential witnesses. They went down the witness list and they said, oh, yeah, I know those people. And as far as I know, that was No. 67, Geoffrey Hickman; 25, Ronald Alexander; 65, Charles Ulbricht. And I think there was a fourth, but I don't know who that fourth was. It could have been--. Do you know who the fourth was?

MR. STREFF: I believe that you may be referring, Your Honor, to Warren Stovall.

THE COURT: Stovall?

MR. ABRAMS: I don't think so.

MR. BERTSCHY: That was only three.

THE COURT: That was only three?

MR. STREFF: Your Honor, I think I know what you're referring to.

THE COURT: That's all I had, three.

MR. STREFF: Richard Wagers has a brother-in-law that works at Caterpillar, at Pontiac, who is a union person and he worked in fuel injector design. They talked about it a lot, quite a bit, and you got to say "struck a valve?" Yes. And also his grandson was at Cat in Peoria. And so he talked --

THE COURT: No, that's not the group.

MR. STREFF: That's not the group. I was just trying to tell you what maybe you were thinking.

THE COURT: Let me tell you what. Once I get this group, then any others you will have to make your record.

MR. STREFF: Yes, please.

THE COURT: And I'll make a decision individually, such as this person you are talking about this, but this person who spent 9 years there and the other individual. There's a group, with any of that testimony. It's those three that I have, unless there is a fourth one. And since everyone seems to say there was three --

MR. STREFF: My recollection comports with opposing counsel.

THE COURT: Okay. The Court will excuse Juror No. 67, Geoffrey Hickman; 25, Ronald Alexander; and 65, Charles Ulbricht, for cause because it appears that they know at least two or more of the potential witnesses. And while they are not their immediate supervisors, it seems to the Court that the nature of the relationship is one that it would be very difficult for those persons not to have some partiality here.

Now, if you want to make any individual motions for cause, Mr. Streff, you can. We will take them up individually.

MR. STREFF: Yes, please, Your Honor.

THE COURT: Okay.

MR. STREFF: The first one deals with Mr. Warren Stovall.

THE COURT: Warren Stovall?

MR. STREFF: Juror No. 48.

THE COURT: Juror No. 48. Now, he's on the second row --

MR. STREFF: Correct.

THE COURT: -- and he's the man --

MR. STREFF: Yes.

THE COURT: -- that knew I played basketball. Is that the guy?

MR. STREFF: Yes, yes.

THE COURT: Okay.

MR. STREFF: He, according to my notes, was at Caterpillar for 28 -- is still at Caterpillar, has been there for twenty-eight and a half years. I also have a note that says both girls work in Caterpillar in computer and one works part-time. Here again he has worked there his entire life, has gotten all of his checks from Caterpillar, will be getting a pension check from Caterpillar, and I believe individually he is -- although, and I agree, Mr. Abrams, I don't believe any of them has improperly said under oath they would be impartial, I just believe that for cause goes to the breadwinning aspect of money being put on the table. There's a lot of money involved here, and I believe it is inappropriate and prejudicial, and this is exactly what a cause for strike is all about.

THE COURT: Okay. Mr. Abrams, Mr. Stovall?

MR. ABRAMS: Yes, Your Honor. First of all, my notes reflect that he's retired.

THE COURT: Is he retired, Mr. Streff?

MR. STEADMAN: That's what I --

MR. LUBBEN: Actually, the questionnaire indicates he's retired, Judge, which I think probably just strengthens our motion, if anything, given that he's probably -- he worked more --

THE COURT: Was he management? See, I feel a little different about that. If he was union, I would not feel that would strengthen your position at all. If he was management, I think it would.

MR. LUBBEN: He testified he was never in a union position. He was management for twenty-eight and a half years.

THE COURT: So -- is that what he said?

MR. ABRAMS: Your Honor, this goes to my point you just ruled on. Mr. Streff wants to exclude anybody who has a relationship with Caterpillar. He worked for -- for 28 years. He retired. He told you during voir dire he could be fair and impartial. And all we're doing is going through a reargument of what you said you were going to eliminate, one category of people, and now we're going to go and eliminate on this theory all of these people again. It's not --

THE COURT: No, he's just one person.

MR. ABRAMS: Well --

THE COURT: And I'm not eliminating everybody who has worked at Caterpillar, but the argument here is that here's a gentleman that was in management for his entire working career, he's now retired and receiving, I presume, retirement benefits from the company. Not due to a union contract, but due to his personal employment contract with Caterpillar. In addition, he has two children who are there now, who theoretically their future at Caterpillar could be affected if for some reason Caterpillar was not pleased with

his work on this jury. That's a little different from just someone being employed at Caterpillar for a long period of time. And I agree with that. I'm not going to exclude someone just because they worked at Caterpillar, but I think these circumstances are a little bit more different from that.

MR. BERTSCHY: Judge, let me point out with respect to some of these guys in management at Caterpillar, we all know most here -- a number of these people left the company, not -- I mean, they were let go in a time period when they were actively soliciting people to leave the company and wanting to get them out. I mean, this may be a gentleman in -- nine years ago would be '93, when it was not a real comfortable time at Caterpillar. I don't think we can just assume he was in management, it's all hunky-dory.

THE COURT: I agree with that, but that's not in the record about that.

MR. STREFF: Your Honor, if I could talk about that. That's totally irrelevant. 350,000 people -- Caterpillar impacts 35,000. Almost a third of these people are involved. So what I'm moving to strike for cause, Mr. Stovall, is because his entire life he has received a check from Caterpillar, the opposing party, and he will be receiving, I would suspect, monthly checks from Caterpillar, including one about the time the jury will go back to deliberate, plus he has two very close relatives, two daughters, working for Cat. There is a clear ability here to see the potential for bias of this individual.

MR. ABRAMS: Your Honor, I think we're all overlooking the word "management" at Caterpillar. I think Your Honor knows well that somebody says they're in management, they're not in -- they may not be in significant management; they're just not at a line job at Caterpillar. There's a big difference in terms of the management, I think, that is being proposed for this gentleman and the management that exists.

THE COURT: What kind of work did he do, do you remember? What was his job? Anybody remember what his job was?

MR. STEADMAN: He had worked on transmissions. He was the one that said he had no idea of magnets or part of the fuel system, but he knew where the fuel system was.

MR. STREFF: Your Honor, if I could just be clear here. I am not looking to strike for cause people who are either pro Caterpillar or anti Caterpillar during some time at Caterpillar or management or union. It's the fact of the matter here we are, we're in a lawsuit against Caterpillar Inc., and people who are current or past employees, getting all of their livelihood from Caterpillar Inc., being asked to sit there and be unbiased. And although they'll try--I know they've answered your questions correctly--that, I believe, is grounds almost for a mistrial to have a Caterpillar person sitting on the jury, deciding about a case between Caterpillar and Sturman, when there are 350,000 other people out here who could be on that jury.

MR. ABRAMS: Your Honor, we're arguing again that same issue. And what Mr. Streff just said is he wants to strike for cause anybody with a past or current relationship with Caterpillar, and that's not -- I mean, I don't think any of these people should be stricken for cause. Your Honor had a subcategory. And now what we're doing is going one by one, and Mr. Streff is going to make the argument with respect to each person that he is a current or retired person at Caterpillar, deriving a paycheck. Well, that is the same thing as striking all these people for cause. And if you want -- you know, Mr. Streff uses the word "mistrial". With all due respect, a mistrial is appropriate in this situation as well. I mean, to exclude a total class of people, that Your Honor recognized he would not, then we'd end up with a jury not representative of this community, which is the basis for a mistrial. I just don't see why Mr. Stovall--who worked there

for 28 years, is retired, said he could be fair and impartial--should be excluded from this jury. I mean, it's going to assume that he's not telling you the truth. It's going to assume he can't do his duty as a juror.

THE COURT: Okay. I've heard enough. Let me pass on Stovall for the moment. Do you have any other for cause?

MR. STREFF: Yes, Your Honor, and -- I'm sorry, I do.

THE COURT: Okay.

MR. STREFF: I must represent my client.

THE COURT: Okay.

MR. STREFF: It is not a question of the class. I think that's preposterous, to try to apply that law to this situation.

THE COURT: Okay.

MR. STREFF: But I raise for Your Honor and I move to strike for cause --

THE COURT: Okay.

MR. STREFF: -- the next person, which is, I'm told, Juror 79.

THE COURT: 79. Oh, Gerilyn Kegley.

MR. STREFF: That's right.

THE COURT: In the back row. Who is Gerilyn Kegley?

MR. STREFF: Right. Basically, she is the one--. You actually interviewed her about third, Judge. She's an executive assistant. Her husband has been employed at Caterpillar for 30 years at Mossville, one of the plants involved. He's worked on cars; that's fine. Her father worked there till he passed away. Her older daughter is

employed there. Older daughter's husband is employed there. Now, she's not Caterpillar through and through, but she's just as close as the guy that you said was Cat through and through, and he's already gone. He worked there. But in this situation, I find it very difficult to believe that a woman who's so tied to Caterpillar can be asked to be unbiased.

MR. ABRAMS: And, Your Honor, I don't want to keep repeating myself, but as Mr. Streff said, he's representing his client, and I'm representing mine.

THE COURT: Right.

MR. ABRAMS: And we're just arguing the same thing again, now, with respect to Juror 79. And she's not been the employee, it's been other people.

MR. STREFF: And, Your Honor, she said Caterpillar has, quote, been a major part of our life, Caterpillar has been good to us. And in that regard, let me be clear. I made a motion in the beginning for a group of people to try to expedite this matter. We could have gone one by one. And I'm going to go through one by one, as best I can, assuming Your Honor lets me, but here is another person Caterpillar through and through.

THE COURT: Okay. Let's move on. What's your next one?

MR. STREFF: Your Honor, we also have to move for cause on the next juror, Brenda Rosiak, No. 6. Here again, her husband was at Caterpillar for 29 years. The paycheck that's come home and food that's been put on the table has been directly from Caterpillar.

THE COURT: Is her husband still at Caterpillar?

MR. STREFF: Let me check that. Brenda Rosiak's husband still employed -- I know he's been there 29 years. I don't want to hazard a guess whether he's the one that spent the entire time or not --

MR. LUBBEN: Yes.

MR. STREFF: -- still at Cat.

MR. LUBBEN: Spouse's occupation is marked as Caterpillar on questionnaire, Judge.

THE COURT: What about Gerilyn Kegley? Is her husband still at Caterpillar too?

MR. STEADMAN: Yes. I have management in Cat at Mossville.

THE COURT: Okay. What's your next one?

MR. ABRAMS: Can I just--. I would just also point out, with No. 6, her husband -- at least my notes say not in management, in union related --

MR. STREFF: Here again, Your Honor --

MR. ABRAMS: I'm just trying to help you with whatever facts you have.

MR. STREFF: You know I believe that's irrelevant. The next one is 72 --

THE COURT: No, no. I mean, to me, whether or not they are in management has some relevance, Mr. Streff. Do you concede that her husband is not in management?

MR. STREFF: I don't have a recollection.

MR. LUBBEN: She testified that her husband was a union welder.

THE COURT: Is that Rosiak?

MR. LUBBEN: No. 6, yes, right.

MR. STREFF: I concede that fact, Your Honor. Where I fall off the wagon is in connection with the granting of the motion to strike based upon whether they are on the union side or management side. If they're on Caterpillar's side, that's where I come with the motion to strike.

THE COURT: Well, my rationale is if someone is in a union, they have a union contract, it solely isn't at the whim of management. If they are considered management, then they're not protected by a union contract. And I presume they may even have employment at will, and that makes a big difference, in my mind.

MR. STREFF: And, Your Honor, as you articulated now, I now understand. What may be involved here--. I don't know if what they're going to argue is whether or not a particular plant could still be open or could be held open, but I think it impacts union workers as well.

THE COURT: Okay.

MR. STREFF: The next one would be Sandra Silldorff, No. 72. Her youngest daughter is a computer programmer at Cat, but her husband retired from Cat. And I asked her, you'll recall, on the voir dire; he'd been there 31 years, and obviously gets a pension. And I don't know whether he was management or union.

MR. ABRAMS: He was union, Your Honor. Or she -- he was union. Mrs. Silldorff's husband was union.

THE COURT: Okay. As to Kegley, I will dismiss her for cause. I will not dismiss Rosiak for cause. As to Silldorff, now, tell me again what her facts are. She is a spouse of --

MR. STREFF: Her husband was employed at Caterpillar. He is now retired after 31 years.

THE COURT: But he was a union guy, wasn't he?

MR. ABRAMS: Yes, he was.

MR. STREFF: Yes.

THE COURT: Okay.

MR. STREFF: And her youngest daughter is a computer programmer at Caterpillar currently.

THE COURT: Okay. I will deny that also. What was your next one?

MR. STEADMAN: Stovall.

MR. STREFF: He's held Stovall.

No. 5, Hester McCosh. She personally has worked at Caterpillar --

THE COURT: Okay.

MR. STREFF: -- for 28 years and she's now in final inspection, I believe. She has relatives at Caterpillar who are both union and management. And this is the lady, Your Honor, who said we don't discuss Cat at their family things because their spouses don't like it.

THE COURT: Yeah.

MR. STREFF: This puts her in an awful position.

THE COURT: She seems like a pretty independent cuss, though, doesn't she?

MR. STREFF: I'll give you that, Your Honor.

THE COURT: I mean, she struck me as someone who's sort of fed up with this debate or discussion or controversy over Caterpillar and she doesn't want to hear it anymore and --

MR. STREFF: Well, Your Honor, just to refresh your recollection on it, she said they were discussing shifts in management and spouses just didn't want to hear that anymore --

THE COURT: Yeah.

MR. STREFF: -- at family gatherings. The fact that they're all so Caterpillar-oriented to me supports a motion to strike her because of her Cat through and through.

THE COURT: You sure you want to ask for that?

MR. STREFF: Yes, Your Honor, I do. There are several others we're not going to, but -- I understand where you're coming from, but that is -- yes, I am. I'm sorry.

THE COURT: Okay.

MR. STREFF: I have clients.

THE COURT: Who was -- have I got rid of that guy who I said he was yellow through and through?

MR. STREFF: Yes, Your Honor. That was Geoff Hickman.

THE COURT: I got through of him, huh?

MR. STREFF: Yes, you did.

THE COURT: Well, my inclination is to err on the side of getting rid of some of them I have some doubt about. And I think Plaintiff's counsel is making a mistake on Hester McCosh, but I will allow it. There is almost a whole family, relatives, of Caterpillar employees.

MR. STREFF: Thank you, Your Honor. I think I have only two more quick ones, but let me check here with the group.

THE COURT: Uh-huh.

MR. ABRAMS: Your Honor, while they're thinking --

MR. STREFF: Your Honor, we're done thinking. We will not move to strike either of the latter two, although they have significant contact with Caterpillar--sons, as well as one of them's got a grandson--but we do renew our motion on Warren Stovall, who is an employee.

MR. ABRAMS: And, Your Honor, I strongly protest. I mean --

MR. STREFF: Not renewing; he held Stovall.

MR. ABRAMS: I understand. But based on what has all happened here, I am -- I am renewing my objection, if you will.

MR. STREFF: Here's a gentleman that spent twenty-eight and a half years in management, has not one but two of his daughters working in Caterpillar. It is very difficult for him in this context to really not be very similar to ones that have been stricken for cause, and to put him in this situation is not right, either. I believe that's not a good basis for him.

MR. ABRAMS: Your Honor, what has happened here, because of the number of peremptories Your Honor has given Mr. Streff and what has gone so far today, he doesn't have to get to the last two he was going to talk about because he's now excluded all related Caterpillar people. And I think, with all due respect, it's outrageous to entertain the motion on No. 48 again, Warren Stovall.

MR. STREFF: Your Honor, let me rephrase.

THE COURT: Well, I did --

MR. STREFF: You held it.

THE COURT: I passed it, so he's entitled to let me make a ruling on it.

MR. STREFF: It's not a question of having more peremptories or not. We are going to use those in other ways. We have passed on people that have significant Caterpillar ties. Mr. Stovall, however, that you held -- and one of the reasons we passed on this is we believe that we should here err on the side of not putting a twenty-eight and a half year employee, with two of his progeny at Cat, in this position.

THE COURT: He's retired now, isn't he?

MR. ABRAMS: Yes, Your Honor.

MR. STREFF: Yes.

THE COURT: Okay. I will exclude Mr. Stovall.

Okay. Let's go peremptories, Mr. Abrams.

MR. ABRAMS: In light --

THE COURT: You have two.

MR. ABRAMS: Your Honor, and I apologize, I know the process is frustrating to everybody, but in light of what Your Honor just did, can we reconnoiter just for a bit?

MR. STREFF: I'd love to do that.

THE COURT: You can. One can go this way and one can go that way; just find an empty room. That's fine.

Michelle, you guys stay in. You guys stay in. We can talk.

THE LAW CLERK: Five minutes, Judge? How long?

THE COURT: Yes. Five minutes.

(Brief recess taken.)

THE COURT: Okay. Mr. Abrams, you go first with two peremptories.

MR. STREFF: I think he goes one and I go two, two --

THE COURT: Oh, I'm sorry, that's right. That's right.

MR. ABRAMS: But I would be happy to take some extras.

THE COURT: I don't know why I--. You know what, usually the Government sits at the table you're sitting at.

MR. ABRAMS: Uh-oh.

THE COURT: Usually the people that -- Plaintiff sits at the -- for some reason they end up sitting at the bench closest to me, so when I look down there, I'm thinking Plaintiff.

MR. ABRAMS: No, I am Plaintiff, but you usually think of Caterpillar as the defendant, is what I think happens; I usually think that way, too. With all due -- we're the Plaintiff here and --

THE COURT: You aren't the Plaintiff?

MR. STREFF: Yes.

MR. LUBBEN: There were some counterclaims, Judge, but those aren't at issue.

MR. STREFF: It's understandable, Your Honor, because there were claims flying back and forth.

THE COURT: I'm -- right. Sorry. You're right. Okay. You go first anyway.

MR. ABRAMS: I do. Thank you, Your Honor. Caterpillar strikes No. 61, Robert Brown.

THE COURT: All right.

MR. STREFF: Your Honor, Defendant Sturmans strike No. 6, Brenda Rosiak. And No. 72, Sandra Silldorff.

THE COURT: Okay. And Mr. Abrams?

MR. ABRAMS: Yes, sir. Caterpillar strikes No. 63, Deborah Campbell.

THE COURT: All right. Are --

MR. STREFF: Okay, Your Honor. Sturman strikes No. 49, Terri Hinthorn, and No. 81, Nanette Clauson.

THE COURT: Oh, yes, okay. And we have the last strike for Plaintiff, Mr. Abrams.

MR. ABRAMS: Your Honor, Caterpillar strikes No. 69, Tim Miller.

THE COURT: And the last strike for Defendants, Mr. Streff.

THE LAW CLERK: Judge, is that a back-strike? Rhonda seems to think -- her page shows that's a back-strike.

MR. ABRAMS: Mine? No, it's not.

THE COURT: No. That last one --

THE CLERK: All right. Campbell --

MR. STREFF: The last two were ours.

MR. ABRAMS: That's correct, Your Honor.

THE COURT: Yeah, that's right.

MR. STREFF: Excuse me, Your Honor. This is where we have to count up ten.

THE COURT: Uh-huh.

MR. STREFF: We strike No. 17, Linda Marlowe.

THE COURT: By the way, did you fellows watch the Open? I mean the -- Woods.

MR. ABRAMS: Yeah, he's great.

THE COURT: Wasn't that fantastic?

MR. FREED: Unbelievable. But I think the last putt he missed was to give everybody just they had -- they might have a chance. I think he did that on purpose.

THE COURT: Well, I tell you, he's improved, because -- I don't know much about golf, but I always thought that putting was the weakness in his game and that when he wasn't on he was vulnerable, but I think this showed me that even when he isn't putting, he's pretty damn good.

MR. ABRAMS: He's incredible. He is truly incredible. I was on -- I don't know if you want to have time for this.

THE COURT: Go ahead.

MR. ABRAMS: I was on an airplane next to some guy who belongs to the club Tiger belongs to --

THE COURT: Yeah?

MR. ABRAMS: -- and he was very friendly, plays with everybody at the club. Except within two to three weeks of a major, he's there and it's like he's in another world. He doesn't see anybody, he doesn't do anything, he just -- he's just focused.

THE COURT: Yeah.

MR. ABRAMS: You know. You're an athlete. You know.

THE COURT: Well, I just got back from a seminar, and one of the judges plays on that public course.

Okay. Here's the jury: No. 13, Jerri Barron; No. 26, Rose Humphrey; No. 52, Ida Dungey; No. 3, Diana Adams --

MR. STREFF: Trantham.

THE COURT: --Trantham. Trantham.

47, the good-looking Megan Wood. Who was that? Mr. Abrams? I knew what you wanted to say. You were just beating around the bush, so I had to say it.

MR. ABRAMS: Well, I appreciate it.

THE COURT: I knew what you wanted to say.

MR. ABRAMS: Well, you made some very funny comments today.

THE COURT: I knew what you wanted to say about third grade. Of course you want to be in third grade.

MR. ABRAMS: Well, I am old, that old.

THE COURT: 62, Connie Scott; 44, Cheryl Fischer; 64, Candace Yeeter (phonetic).

MR. STREFF: Yater (phonetic).

THE COURT: Yeater. How many is that? One, two, three --

THE CLERK: That's eight.

THE COURT: -- four, five, six, seven, eight.

Number nine is Janet Webster. And number ten is Kurt Hobart. So there's the jury.

MR. STREFF: What numbers were number nine and ten?

MR. ABRAMS: Hobart is No. 82.

THE COURT: My number nine was No. 9, Janet Webster. She's the ninth juror.

MR. STREFF: Works for me. I mean the numbers work for me.

THE COURT: Uh-huh.

MR. STREFF: And it's Ida Dungey, is the way she pronounces it.

THE COURT: Dungey?

MR. STREFF: Uh-huh.

THE COURT: I propose that we stop for today and have opening statements tomorrow morning.

MR. STREFF: I would love to agree with that proposal, Your Honor, but I am informed and believe that the Plaintiffs have filed four motions against Defendants' openings.

THE COURT: No, I'll take the motions. We let the jury go but we stay, and we have opening statements tomorrow.

MR. STREFF: Yes, we agree.

THE COURT: Let's not try to get opening statements in today.

MR. STREFF: I don't think we could do it in the time allotted, Judge.

THE COURT: Okay. Good. I'm not displeased with the jury.

MR. STREFF: Thank you, Your Honor.

MR. ABRAMS: Thank you, Your Honor.

(The following proceedings were held in the presence and hearing of the jury panel.)

THE COURT: All right. I will call off the names of the ten jurors: Juror No. 13, Jerri Barron.

MS. BARRON: Barron.

THE COURT: Barron. Juror No. 26, Rose Humphrey. Juror No. 52, Ida Dungey.

MS. DUNGEY: Dungey.

THE COURT: Dungey. Juror No. 3, Diana Adams-Trantham; Juror No. 47, Megan Wood; Juror No. 62, Connie Scott; Juror No. 44, Cheryl Fischer; Juror No. 64, Candace Yater, Yeeter, which one?

MS. YEATER: Yater (phonetic).

THE COURT: Yeater. Juror No. 9, Janet Webster; Juror No. 82, Kurt Hobart. You are the ten members of the jury. Those of you whose names were not called, you have satisfied your service in connection with this case and are discharged with the Court's thanks. And my hope is that sometime in the near future you do serve on a jury so that

you can go through an entire process and feel what I mean when I tell you what happens in a federal court in deciding a case by jury. I think it will make you feel good about our system, and how it works. But I appreciate your willingness to serve, and you are discharged, and you may leave. The jury members, you stay. You have to call Wednesday -- Wednesday, yes, please. Call Wednesday.

(Whereupon the unselected panel members left the courtroom.)

THE COURT: Now those of you who are members of the jury, please stand and raise your right hand and be sworn in.

(Jury sworn.)

THE CLERK: Thank you.

THE COURT: All right. Please, now, I'm going to have you go into the jury room, which will be your home for the next three weeks, about. And Rhonda will come in and give you orientation, because we want things to be as comfortable for you as possible, and to do everything we can to make your visit enjoyable and productive, so there's some things that she wants to discuss with you. And then as soon as she's done you're free to leave, and we will come back and start the trial tomorrow morning at 9:00.

Now, you aren't to discuss the case. And your relatives are going to be extremely interested in knowing what the case is all about, and you're going to have to tell them I can't discuss it with you until after it's over, then I will discuss every- thing with you. The reason for that is, if you mention some- thing, these people whom you love and respect may say something which may affect your decision, and you can't have that, because you have to make your decision based upon only what you hear here in this courtroom. So don't talk about the case. And I would suggest that you have someone screen the paper for you

because -- I didn't see him or her, but this is a case worth -- newsworthy, and I suspect there may be something in the paper about it, and here again I don't want you affected by anything like that, either. So I will see you tomorrow morning at 9:00. And if you will go in the jury room -- 9:30. 9:30 instead of 9:00; I've been told I got something else at 9:00. 9:30 tomorrow morning.

Supreme Court, U.S.
FILED
MAY 9 - 2005
OFFICE OF THE CLERK

(2)

No. 04-1340

IN THE

Supreme Court of the United States

CATERPILLAR INC.,

Petitioner,

v.

STURMAN INDUSTRIES, INC.,
ODED E. STURMAN, AND CAROL K. STURMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Sturman Industries, Inc. states that it has no parent companies and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition for certiorari in this case is wholly contrived: it challenges the Federal Circuit's application of settled Seventh Circuit law (which is therefore not binding on either the Seventh Circuit or the Federal Circuit), conjures up bogus "circuit splits," and presents questions that were never raised below. Caterpillar is upset that a unanimous panel of the Federal Circuit reversed a hometown jury verdict in Caterpillar's favor on the ground that the trial court erred by rejecting a for-cause challenge to a juror married to a Caterpillar employee. According to Caterpillar, the reversal of the jury verdict violates its Seventh Amendment right to a jury trial. That argument, however, is frivolous. An employer has no constitutional right to have its employees and/or their spouses sit on a jury adjudicating the employer's case; to the contrary, the employer's litigation adversary has a right *not* to have the employer's employees and/or their spouses sit on the jury. Needless to say, Caterpillar can hardly present itself as a victim where Caterpillar itself chose the forum and vigorously opposed all efforts to keep Caterpillar-connected prospective jurors off the jury. In any event, Caterpillar never presented its current arguments below, and its efforts to manufacture a circuit split are unavailing. Accordingly, this Court should deny review.

COUNTERSTATEMENT OF THE CASE

Petitioner Caterpillar brought this lawsuit in its hometown of Peoria, Illinois, seeking millions of dollars in damages from respondents (collectively the Sturmans), who in turn counterclaimed against Caterpillar. Needless to say, the Sturmans were aware that the jury pool would include persons with strong Caterpillar ties. Accordingly, at the beginning of the jury selection process, the Sturmans moved to dismiss for cause (1) Caterpillar employees or retirees, and (2) spouses of Caterpillar employees or retirees. Pet. App. 175-79a. Potential jurors in these two categories, the Sturmans explained, necessarily had a financial interest in the outcome of the case,

given their link to Caterpillar's ongoing financial fortunes. *See id.* "It is not appropriate or fair to have people whose livelihood, whose dollars, come from the opposing party and have them sit on the jury .... I don't believe that they can truly be fair in their own minds. That goes to spouses especially ...." Pet. App. 178a. Among the jurors covered by the Sturman's categorical challenge was Juror No. 3, the spouse of a current Caterpillar employee. Pet. App. 126a.

Caterpillar opposed the Sturmans' motion, suggesting that the categorical exclusion of these Caterpillar-connected jurors would violate *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. App. 177-79a. According to Caterpillar:

> This jury is supposed to be representative of this community. And this community is composed of people that have relationships and ties with Caterpillar. ... [W]hat [the Sturmans are] suggesting here is no different than a *Batson* situation. Your Honor, they're trying to exclude a class of people, and the class of people here is anybody having a relationship with Caterpillar. It's not a fair approach. It is not the representation of this community.

Id. The district court agreed with Caterpillar and denied the Sturmans' motion, asserting that "Caterpillar is an important part of this community, and it would not be a representative community [jury] without some Caterpillar connection." Pet. App. 180a.

The Sturmans thereafter made individual challenges for cause that went beyond their unsuccessful categorical challenge. Pet. App. 19a; 181-93a. At least three times, Caterpillar contested these individual challenges on the ground that the Sturmans were simply rearguing their previous categorical objection individually. *See* Pet. App. 183a, 187a; *see also id.* at 185a ("Your Honor, we're arguing again that

same issue. ... [N]ow what we're doing is going one by one, and [the Sturmans are] going to make the argument with respect to each person that he is a current or retired person at Caterpillar, deriving a paycheck. Well, that is the same thing as striking all these people for cause."). Caterpillar also reiterated its position that excluding individuals with a past or current relationship with Caterpillar would be grounds for a "mistrial." *Id.*

Because the trial court's denial of the Sturmans' for-cause challenges left many prospective jurors with Caterpillar connections in the jury pool, the Sturmans were forced to allocate their five peremptory challenges sparingly. In particular, they did not use a peremptory challenge to strike Juror No. 3, the spouse of a current Caterpillar employee, because they wanted to ensure that certain other prospective jurors were not seated as the jury selection process continued. The Sturmans ultimately used all five of their peremptory challenges, but Juror No. 3 sat on the jury that ruled in Caterpillar's favor.

After the trial court entered judgment on the verdict, the Sturmans appealed to the Federal Circuit (because the case included claims arising under the patent laws). A unanimous Federal Circuit panel, applying Seventh Circuit law with respect to the jury selection issue, reversed the judgment in Caterpillar's favor based on the trial court's denial of the Sturmans' categorical for-cause challenge to Juror No. 3. Pet. App. 14-27a. Caterpillar petitioned for rehearing in the Federal Circuit, but not a single judge voted to grant the petition. Caterpillar now seeks a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

I. The Federal Circuit Properly Applied Seventh Circuit Law On Implied Bias, There Is No Circuit Split On This Issue, And Caterpillar Did Not Raise Its Current Argument Below.

Caterpillar's first question presented asks this Court to abolish the doctrine of "implied bias," under which certain narrow categories of prospective jurors (*e.g.*, relatives, employees of the litigants) are conclusively presumed to be disqualified, regardless of any assurances of impartiality. The doctrine has ancient common-law roots; indeed, as the *en banc* Ninth Circuit recently noted, it "may indeed be the single *oldest* rule in the history of judicial review." *Dyer v. Calderon*, 151 F.3d 970, 984 (1998) (*en banc*) (Kozinski, J.) (tracing the common-law doctrine back to *Bonham's Case*, 77 Eng. Rep. 646, 652 (C.P. 1610)); *see also Crawford v. United States*, 212 U.S. 183, 195-96 (1909) (applying doctrine); *United States v. Burr*, 25 F.Cas. 49, 50 (D. Va. 1807) (Marshall, C.J., sitting by designation) (same). Caterpillar, however, now labels the doctrine "controversial," Pet. 2, and asserts that this Court "sound[ed] the death knell" for the doctrine in *Smith v. Phillips*, 455 U.S. 209 (1982), Pet. 3; *see also id.* at 8 (asserting that this Court "proscri[bed] ... implied bias in *Smith v. Phillips*").

That assertion is simply untrue. *Smith* presented the question whether a habeas petitioner was entitled to relief on the ground that a juror in his criminal case, "submitted during the trial an application for employment as a major felony investigator in the District Attorney's Office," which was prosecuting the case. 455 U.S. at 212. Under these circumstances, this Court refused to impute bias to the juror as a matter of law. *See id.* at 215-18. The Court did not, however, remotely purport to abolish the venerable doctrine of implied bias altogether, or to overrule its earlier cases applying that doctrine. Indeed, Justice O'Connor joined the Court's opinion, but wrote separately "to express

[the] view that the opinion does not foreclose the use of 'implied bias' in appropriate circumstances." *Id.* at 221 (concurring opinion); *see also McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556-57 (1984) (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring) (endorsing doctrine of implied bias); *id.* at 558 (Brennan, J., joined by Marshall, J., concurring in judgment) (same); *J.E.B. v. Alabama*, 511 U.S. 127, 143-44 (1994) ("*Voir dire* provides a means of discovering actual *or implied* bias.") (emphasis added).

Not surprisingly, Caterpillar's assertion that the circuits are "irreconcilably in conflict" with respect to the ongoing validity of the implied bias doctrine, Pet. 10 (capitalization modified), is manifestly incorrect. As the *en banc* Ninth Circuit recently explained, after canvassing the history of the doctrine, "every court that has dealt with the question has understood ... that prejudice must sometimes be inferred from the juror's relationships, conduct or life experiences, without a finding of actual bias." *Dyer*, 151 F.3d at 984; *see also id.* at 985 ("No opinion in the two centuries of the Republic—except the dissent in our case—has suggested that a criminal defendant might lawfully be convicted by a jury tainted by implied bias.").

According to Caterpillar, however, "[t]he Eighth Circuit has definitively rejected the implied bias doctrine altogether, and requires the party challenging a juror to demonstrate actual bias." Pet. 11 (citing *Rogers v. Rulo*, 712 F.2d 363 (8th Cir. 1983), and *United States v. Kelton*, 518 F.2d 531 (8th Cir. 1975) (*per curiam*)). Notwithstanding some broad language in those opinions, they do not stand for the sweeping proposition that the Eighth Circuit will *never* imply bias (which the Eighth Circuit could hardly hold in light of this Court's contrary precedent), but only that the Eighth Circuit would not imply bias in the particular circumstances presented there. Thus, in subsequent cases, the Eighth Circuit has recognized the ongoing

validity of the implied bias doctrine. *See, e.g., United States v. Tucker*, 243 F.3d 499, 509 (8th Cir. 2001); *Fuller v. Bowersox*, 202 F.3d 1053, 1056 (8th Cir. 2000); *United States v. Parmley*, 108 F.3d 922, 924 (8th Cir. 1997) (*per curiam*). Indeed, in its unsuccessful petition for rehearing in the Federal Circuit, Caterpillar itself cited *Parmley* as standing for "*implied bias* when jurors acquired prejudicial information in prior proceeding against defendant." Caterpillar Pet. for Reh'g 13 n.10 (emphasis added).

In the absence of a real circuit split, Caterpillar quickly falls back on the argument that some circuits have "expressed doubts" about the implied bias doctrine. Pet. 11-12. But none of those circuits, as Caterpillar implicitly acknowledges, have held that the doctrine does not exist. To the contrary, the doctrine is alive and well in the very circuits cited by Caterpillar (including the Seventh Circuit, which provided the governing law in this case). *See, e.g., United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000) ("The concept of implied bias is well-established in the law. Many of the rules that require excusing a juror for cause are based on implied bias, rather than actual bias."); *Hughes v. United States*, 258 F.3d 453, 458 (6th Cir. 2001) ("Challenges for cause are subject to approval by the court and must be based on a finding of actual *or implied* bias.") (emphasis added; internal quotation omitted); *United States v. Rhodes*, 177 F.3d 963, 965 (11th Cir. 1999) ("[W]hen bias is implied because the juror has some special relationship to a party (such as a familial or master-servant relationship), the court must dismiss the prospective juror for cause."); *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1050-51 (4th Cir. 1984) (holding that bias must be implied when a prospective juror owns stock in a corporate party).

In any event, Caterpillar's argument that the implied bias doctrine has been and/or should be abolished is not properly presented here, because Caterpillar never raised any such

argument below, and the lower courts consequently did not have the opportunity to consider or address any such argument. To the contrary, as noted above, Caterpillar responded to the Sturmans' implied-bias challenge in the district court not by disputing the validity of the implied-bias doctrine, but instead by asserting a *Batson*-style right to a "representative" jury comprised in part of Caterpillar-connected jurors. Pet. App. 177-79a. Nor did Caterpillar argue on appeal that the implied bias doctrine had been and/or should be abolished altogether; instead, Caterpillar insisted that the Sturmans had "waived" any challenge to Juror No. 3 by failing to challenge that juror individually for cause in the district court. *See* Opp. App. 5-7a. Needless to say, this Court is not in the business of granting certiorari to review issues that were neither pressed nor passed upon below. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Thus, the first question presented, to the extent it challenges the validity of the implied bias doctrine at all, is bogus. The real question presented is whether the Federal Circuit properly applied Seventh Circuit law (since this is not a patent issue, *see* Pet. App. 23a) on whether bias should have been implied on the facts of this case. That narrow question, however, is not remotely worthy of this Court's review. Indeed, because the decision below involves the Federal Circuit's interpretation of Seventh Circuit law, it is not binding on *either* the Seventh Circuit *or* the Federal Circuit. And Caterpillar did not even squarely address that narrow question below; rather, it couched its argument in waiver terms, insisting that the Sturmans' "generic motion to strike all current and former Caterpillar employees and their relatives" did not suffice to preserve the Sturmans' objection to Juror No. 3 for appeal. Opp. App. 5a.

The Federal Circuit readily rejected that waiver argument, *see* Pet. App. 17-23a, and it does not remotely present an issue worthy of this Court's review.[1]

Under common law stretching back to Blackstone's day, moreover, courts have recognized that it is appropriate to impute bias to prospective jurors in cases involving their private employers. *See, e.g., United States v. Wood*, 299 U.S. 123, 138 (1936) (citing Blackstone); *Crawford*, 212 U.S. at 195-96 (same).[2] The Federal Circuit, like the Tenth Circuit, *see Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1122 (10th Cir. 1995), simply recognized that this rule logically applied to the spouses of employees, who have the same financial interest as an employee in the employer's financial welfare, *see* Pet. App. 23-27a. Not surprisingly, thus, Caterpillar has not identified a single case holding that the spouse of an employee should be treated differently from an employee for purposes of implied bias.[3]

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[1] Caterpillar's repeated assertions that the Sturmans "acquiesce[d] in Juror No. 3's service," Pet. 24, "expressly announced a decision not to challenge" Juror No. 3, *id.* at 25, and "raised their objections to Juror No. 3 for the first time" in a post-trial motion, *id.* at 5, are simply false. As noted in the text, and specifically upheld by the Federal Circuit, the Sturmans categorically challenged current and retired Caterpillar employees and their spouses for cause, and that categorical challenge encompassed Juror No. 3.

[2] As Caterpillar points out, *see* Pet. 13, a panel of the Ninth Circuit has stated that "we do not have a per se rule against employees serving as jurors in a case involving their employer." *Nathan v. Boeing Co.*, 116 F.3d 422, 425 (9th Cir. 1997) (Wallace, J.). It is questionable at best, however, whether that panel opinion (which limited the doctrine of implied bias to cases in which a prospective juror employed by a litigant was under "reasonable apprehension of violence," *id.*) survived the Ninth Circuit's subsequent *en banc* decision in *Dyer*, 151 F.3d 970. Indeed, the panel opinion in *Dyer* (which the Ninth Circuit took *en banc* and reversed) was written by none other than Judge Wallace, the author of the panel opinion in *Nathan*.

[3] Caterpillar's predictions of doom and gloom resulting from the Federal Circuit's decision are, to put it mildly, fanciful. Those predictions are based primarily on Caterpillar's assertion that the decision below necessarily would

II. The Federal Circuit Properly Applied This Court's Law On Preservation Of Juror Challenges, There Is No Circuit Split On This Issue, And Caterpillar Did Not Raise Its Current Argument Below.

Caterpillar next argues that, even if the trial court erred by denying the Sturmans' categorical for-cause challenge to Juror No. 3, the Sturmans waived their right to appeal that error by failing to use a peremptory challenge to strike that juror. Pet. 21-26. Again, that argument is meritless, and provides no basis for this Court's review.

Indeed, this argument really boils down to nothing more than a challenge to *United States v. Martinez-Salazar*, 528 U.S. 304 (2000). That recent decision, joined by seven Justices of this Court, specifically rejected the rule proposed by Caterpillar here: that a litigant in federal court should be required "to use a peremptory challenge to strike a juror who should have been removed for cause, in order to preserve the claim that the for-cause ruling impaired the defendant's right to a fair trial." *Id.* at 314. Such a litigant, the *Martinez-Salazar* Court explained, should not be required to "use a peremptory challenge curatively" to correct an error by the trial court. *Id.* at 315. To the contrary, a litigant who uses a peremptory challenge to strike a juror *loses* the right to appeal the denial of a for-cause challenge to that juror, since the litigant cannot complain about

---

apply to all corporate affiliates of a litigant. *See* Pet. 21 ("[T]he spouse of an employee making Hanes underwear (headquartered in North Carolina) would be excluded from jury service in a case against Jimmy Dean sausages (headquartered in Cincinnati), or Kiwi shoe polish, or Coach handbags, all of which are (or were) owned by Sara Lee Corporation. The spouse of an employee making Life Savers candy would be excluded from jury service in a case against Phillip Morris cigarettes, once under common corporate ownership."). This case does not present the issue whether bias should be imputed to employees of corporate affiliates: this case was brought by Caterpillar in its hometown of Peoria, Illinois, and the prospective juror was the spouse of a Caterpillar employee.

a juror who did not actually sit on his or her jury. *See id.* at 315-16. The Federal Circuit thus properly applied *Martinez-Salazar* here by holding that the Sturmans did not forfeit, but indeed preserved, their challenge to the district court's denial of their for-cause challenge to Juror No. 3 by not using a peremptory challenge to remove her from the jury. *See* Pet. App. 26-27a.

Caterpillar, however, asserts that "the lower courts are ... divided" on "the interpretation and application" of *Martinez-Salazar*. Pet. 21; *see also id.* at 3 (asserting that "the courts of appeals are divided" on the *Martinez-Salazar* issue). That assertion, once again, is incorrect. In support of that assertion, Caterpillar cites a grand total of two cases: (1) *Thompson v. Altheimer & Gray*, 248 F.3d 621 (7th Cir. 2001), and (2) *Merritt v. Evansville-Vanderburgh School Corp.*, 765 N.E.2d 1232 (Ind. 2002). Neither one supports Caterpillar's assertion.

Thompson did not challenge the rule of *Martinez-Salazar*, and indeed *reversed* a jury verdict based on the trial court's erroneous denial of a for-cause challenge. *See* 248 F.3d at 624-27. Although Judge Posner, writing for the *Thompson* majority, expressed some skepticism about *Martinez-Salazar*, he expressly *declined* to address the issue raised by Caterpillar here, "since the defendant is not arguing that the plaintiff's failure to use a peremptory challenge against [the allegedly biased juror] prevents the plaintiff from challenging [the juror's] presence on the jury." *Id.* at 623. And Judge Diane Wood wrote a concurring opinion in that case just to emphasize that "I do not share the majority's reservations about [the *Martinez-Salazar*] rule, and I therefore support strongly the majority's decision to reserve any exploration of this rule for another day (assuming for the sake of argument that the Supreme Court has left us any room in which to operate)." *Id.* at 627.

Merritt, if anything, provides even less support for Caterpillar's position. In that case, the Indiana Supreme Court decided, as a matter of Indiana state law, that a litigant cannot challenge the denial of a for-cause challenge to a juror on appeal unless the litigant has exhausted its peremptory challenges. *See* 765 N.E.2d at 1237. The *Merritt* Court acknowledged that this Court said in *Martinez-Salazar* "that under federal law a defendant is *not* required to use a peremptory strike to preserve a challenge-for-cause denial claim," *id.* at 1236 n.5 (emphasis added), but simply disagreed with that position. Needless to say, the fact that Indiana has adopted a different rule under state law than this Court has adopted under federal law does not establish any conflict on an issue of federal law.

In any event, Caterpillar's critique of the *Martinez-Salazar* rule is not well-founded. It is fanciful to attribute "gamesmanship," Pet. 3, 21, 22, 23, 24, 26, to a litigant invoking the rule, because by definition a litigant invoking the rule has unsuccessfully challenged a juror for cause. If the trial court had not erred by denying the for-cause challenge in the first place, there would be no problem at all. *See Thompson*, 248 F.3d at 627 (D. Wood, J., concurring) ("It is important to remember that no problem arises until the party has challenged a prospective juror for cause and the court has rejected the challenge. The district court thus cannot be sand-bagged into permitting a biased juror to sit."). As the *Martinez-Salazar* Court recognized, a litigant in this situation faces a "hard choice": either use a peremptory to strike an objectionable juror (and lose the right to challenge the disputed for-cause ruling on appeal), or allow the objectionable juror to be seated. 528 U.S. at 315. This is not the stuff of "gamesmanship." To the contrary, it is Caterpillar that proposes a "heads-I-win-tails-you-lose" regime in which a litigant loses the right to appeal an erroneous for-cause challenge if he exercises a peremptory challenge *and* if he does not. In any event, this Court carefully

considered this issue just recently in *Martinez-Salazar*, and Caterpillar proffers no reason for this Court to revisit the issue again now.[4]

Finally, Caterpillar's argument regarding *Martinez-Salazar*—like its argument concerning implied bias—is brand new; Caterpillar never made that argument below. While the Sturmans pointed out in their opening brief on appeal that *Martinez-Salazar* required reversal of the judgment if the Federal Circuit agreed that the district court erred in denying the Sturmans' for-cause challenge to Juror No. 3, *see* Opp. App. 3-4a, Caterpillar did not address that argument in its response brief, *see* Opp. App. 5-7a. Instead, Caterpillar simply asserted in a footnote that "Sturmans' reliance on [*Martinez-Salazar*] is misplaced ... [because] the Court ruled that the presence of a biased juror was error where defendants individually objected to the juror and only if the objection was preserved." Opp. App. 7a n.5. Needless to say, that assertion (which simply reiterated Caterpillar's argument that the Sturmans' categorical for-cause challenge did not preserve their objection to Juror No. 3) is a far cry from Caterpillar's current argument that *Martinez-Salazar* spells the end of the jury system as we know it. Having failed to raise its current argument below, and hence having denied the lower courts the opportunity to address that argument, Caterpillar is in no position to raise that argument now. *See, e.g., United Foods*, 533 U.S. at 417; *Yeskey*, 524 U.S. at 212-

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[4] Caterpillar also asserts in passing that "[i]n conflict with the decision below, the Ninth Circuit holds that a defendant waives his challenge to jurors by failing to follow the judge's preference for individual, rather than blanket *per se* analysis." Pet. 25 (citing *Zamora v. Guam*, 394 F.2d 815, 816 (9th Cir. 1968)). That assertion, as the Federal Circuit noted, is meritless. "*Zamora* is distinguishable from this case," the Federal Circuit explained, because *Zamora* involved *actual* bias (which must be fleshed out on an individual basis), whereas this case involves *implied* bias (which is categorically attributed to certain groups of prospective jurors). *See* Pet. App. 22a.

13; *Rogers*, 458 U.S. at 628 n.10; *Ortiz*, 422 U.S. at 898; *Adickes*, 398 U.S. at 147 n.2.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

[. . .]

ARGUMENT

I. The District Court Erred By Allowing The Spouse Of A Caterpillar Employee To Sit On The Jury.

The district court erred, as a threshold matter, by allowing Juror No. 3, the spouse of a current Caterpillar employee, to sit on the jury that ruled in Caterpillar's favor. Under settled law, "a court *must* excuse a juror for cause if the juror is related to one of the parties in the case, or if the juror has even a tiny financial interest in the case." *United States v. Polichemi*, 219 F.3d 698, 704 (7th Cir. 2000) (emphasis added). Being married to a party's employee necessarily meets that standard: an employee's spouse has a self-evident interest in the employer's financial health. Indeed, "[t]his is precisely the type of relationship that requires the district court to presume bias and dismiss the prospective juror for cause," *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995), *regardless* of whether the juror asserts that he or she could be impartial, *see id.* "The determination of implied bias is a question of law reviewed *de novo*." *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 517 (10th Cir. 1998); *see also Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992) (same).

Precisely because allowing the spouse of a party's employee to serve on the jury is such manifest error, the Sturmans moved before trial to dismiss for cause every Caterpillar employee, retiree, or spouse of a Caterpillar employee or retiree, *see* A20172-74, explaining their reasoning thus:

> MR. STREFF: It is not appropriate or fair to have people whose livelihood, whose dollars, come from the opposing party and have them sit on the jury.... I don't believe that they can truly

> be fair in their own minds. *That goes to spouses especially* ....

A20175-76 (emphasis added). Indeed, the Sturmans noted that denial of their motion to dismiss for cause "would be not just highly prejudicial, but it would be grounds for a mistrial to allow those people who are so closely tied to the company category to be members of the jury." A20172-73; *see also* A20184. And the district court specifically acknowledged that the Sturmans' motion applied to "*spouses of current employees*." A20174 (emphasis added). There is no dispute that Juror No. 3 falls into this category: she specifically identified herself as the spouse of a Caterpillar employee, A20115-16, and the Sturmans specifically identified her on a list of eleven prospective jurors that they sought to dismiss for cause in light of their connections to Caterpillar, A20172-73.

Caterpillar vehemently opposed the dismissal for cause of current and former Caterpillar employees and/or their spouses, suggesting that such persons were a constitutionally protected group under *Batson v. Kentucky*, 476 U.S. 79 (1986):

> MR. ABRAMS: This jury is supposed to be representative of this community. And this community is composed of people that have relationships and ties with Caterpillar. ...[W]hat [the Sturmans are] suggesting here is no different than a *Batson* situation. Your Honor, they're trying to exclude a class of people, and the class of people here is anybody having a relationship with Caterpillar. It's not a fair approach. It is not the representation of this community.

A20174, A20177. The district court accepted this outlandish suggestion and denied the Sturmans' motion. According to

the court, "Caterpillar is an important part of this community, and it would not be a representative community [jury] without some Caterpillar connection. ... I'm not eliminating everybody who has worked at Caterpillar." A20178, A20182. Thus, the only Caterpillar-connected prospective jurors the court excused for cause were: (1) people who knew potential trial witnesses personally, A20178, A20180; and (2) a single spouse of a Caterpillar manager (in contrast to the spouses of Caterpillar union employees, like Juror No. 3); A20186-90.

That decision is plainly erroneous. The employees of a party and/or their spouses have no constitutional right to sit on a jury adjudicating their employer's rights and liabilities; to the contrary, the party adverse to their employer has a constitutional right *not* to have such persons on the jury. Were the law otherwise, a large employer (like Caterpillar) could always sue in its hometown (like Caterpillar did here), and unfairly obtain a jury comprised at least in part of its own employees and/or their spouses. Nor were the Sturmans required, after the district court specifically denied their blanket objection to all current and former Caterpillar employees and their spouses, to continue raising that same objection with respect to individual jurors; once the Sturmans had made the basis for their objection clear and had been rebuffed by the district court, they were not required to continue pressing the point. *See, e.g., Dresser Indus., Inc. v. Gradall Co.*, 965 F.2d 1442, 1450 (7th Cir. 1992). And nor, for that matter, were the Sturmans "obliged to use a peremptory challenge to cure the judge's error." *See, e.g., United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000); *see also id.* at 315-16; *Polichemi*, 219 F.3d at 704.

Because the district court erred by refusing to dismiss Juror No. 3 for cause, *and she actually sat on the jury that ruled in Caterpillar's favor*, the Sturmans are entitled to a new trial as a matter of law. *See, e.g., Martinez-Salazar*, 528

U.S. at 316; *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001). Precisely because "the presence of a biased juror, like the presence of a biased judge, is a 'structural defect'" in the trial, it is impervious to harmless-error review. *Hughes*, 258 F.3d at 463; *see also Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998); *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992). Accordingly, this Court should reverse the judgment in Caterpillar's favor, and remand for a new trial on all issues submitted to the jury.[1]

[. . .]

[1] Reversing the judgment in Caterpillar's favor in light of the tainted jury verdicts would also entail vacating the district court's order directing the Sturmans to assign Caterpillar sole ownership of the '329 and '987 patents based on those verdicts, A42-43.

APPENDIX B

[. . .]

IV. ARGUMENT

A. Sturmans Waived (And Had No Grounds For) Objection To Juror No. 3

The district court correctly ruled: "Sturmans were aware of Juror No. 3's marriage to a Caterpillar employee yet declined to individually challenge her for cause when offered the opportunity by the Court to do so. Accordingly, this matter is waived." (A9.) The district court's decision is reviewed for abuse of discretion. *United States v. Beasley*, 48 F.3d 262, 266 (7th Cir. 1995).

As the Supreme Court held in *Frazier v United States*, a defendant who accepts jurors before trial may not challenge them in a motion for new trial. 335 U.S. 497, 513 (1948); *United States v. Gordon*, 253 F.2d 177, 185 (7th Cir. 1985). If a defendant knows of a basis for challenge and stands mute, gambling on an acquittal while holding the issue in reserve, such conduct may be regarded as waiver by deliberate concealment. *United States v. Shakur*, 723 F. Supp. 925, 932-33 (S.D.N.Y. 1988).

There is no merit to Sturmans' argument that their generic motion to strike all current and former Caterpillar employees and their relatives sufficed. Such a "class" is not presumed biased as a matter of law; rather, bias must be shown individually. For example, in *United States v. Polichemi*, the court ruled that "government employment alone is not, and should not be, enough to trigger the rule under which an employee is disqualified from serving as a juror in a case involving her employer." 219 F.3d 698, 704 (7th Cir. 2000); *United States v. Caldwell*, 543 F.2d 1333, 1347 (D.C. Cir. 1974) ("absent a specific showing of bias, a

defendant accused of murdering a police officer is not entitled to a jury free of policemen's relatives").

Thus, the district court did not abuse its discretion in overruling Sturmans' blanket objection and directing Sturmans to object to individual jurors. Although Sturmans made individual motions, including one against a Caterpillar employee spouse (which the court sustained), they did not mention Adams-Trantham until months after the trial had ended. In these circumstances, the district court correctly ruled "Sturmans cannot now, at this last stage [motion for new trial], challenge the propriety of Juror 3 after accepting her at the close of the jury selection proceedings." (A9.) *Zamora v. Guam*, 394 F.2d 815, 816 (9th Cir. 1968) (defendant waived objection to jurors despite general objection where trial judge invited defense counsel to explore prejudice with individual jurors and failed to do so).[4]

None of Sturmans' cited authorities holds or even suggests that a district court abuses its discretion, as a matter of law, by empanelling a juror who is also a corporate party employee's spouse, nor do they suggest that Sturmans had a non-waivable right to removal of such a juror. In *Getter v. Wal-Mart Stores*, 66 F.3d 1119, 1122 (10th Cir. 1995), plaintiff made an *individual* challenge to a prospective juror who both held stock in the corporate defendant *and* whose

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[4] Sturmans' citation to *Dresser Indus., Inc. v. Gradall Co.*, 965 F.2d 1442, 1450 (7th Cir. 1992), is unavailing and, if anything, supports Caterpillar. First, *Dresser* deals with jury instructions, has nothing to do with jury selection, and does not permit a party to preserve objection by disregarding a court's express direction to make individual challenges for cause. Second, *Dresser* states that a party may be excused from objecting again (to jury instructions) only where doing so would be futile. Here, Sturmans did in fact re-object to one Caterpillar-spouse on individual grounds, and the objection was sustained; thus, individual objections were not futile.

spouse worked for that defendant; here, Sturmans made no individual motion and there is no evidence Adams-Trantham owned stock in Caterpillar. In *Polichemi*, 219 F.3d at 703-06, the court found error in seating a juror in a criminal case who herself was a fifteen-year employee of the prosecutor's office.[5]

Fully cognizant of the district court's requirement for individual challenges, Sturmans made the tactical decision not to challenge Adams-Trantham. They thereby waived any objection, and there is no reason to permit Sturmans to benefit now from their deliberate choice at trial.

[. . .]

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[5] Sturmans' reliance on *United States v. Martinez-Salazar* and *Hughes v. United States*, (Sturmans' Br. 26), is misplaced. In *Martinez-Salazar*, the Court ruled that the presence of a biased juror was error where defendants individually objected to the juror and only if the objection was preserved. 528 U.S. 304, 308-09 (2000). In *Hughes*, the court ruled a juror must be excused only where actual bias is shown, and ruled that a juror's statement that "I don't think I could be fair" was sufficient basis. 258 F.3d 453, 460-64 (6th Cir. 2001). Here, Sturmans presented no evidence of bias and did not preserve the objection.

(3)

Supreme Court, U.S.
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No. 04-1340

IN THE

Supreme Court of the United States

CATERPILLAR INC.,
Petitioner,

v.

STURMAN INDUSTRIES, INC., ODED E. STURMAN, AND CAROL K. STURMAN
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petition explains the clear conflict that exists—and that circuit judges have perceived and discussed—on frequently recurring questions of exceptional practical and jurisprudential importance. Respondents counter with a recitation of anti-certiorari platitudes that have no bearing on this case. By aiming verbal pyrotechnics at strawmen, respondents fail to enshroud the compelling reasons for this Court to resolve a question on which "the federal courts of appeal [are] split." *Dyer* v. *Calderon*, 151 F.3d 970, 995 (9th Cir. 1998) (O'Scannlain, J., dissenting).

When the smoke clears from respondents' rhetoric, several dispositive truths remain. For all respondents' talk about "ancient common-law roots" (Br. in Opp. 4), they cite no prior case that vacated a judgment because the spouse of an employee of a party sat on the jury. For all respondents' talk about "stretching back to Blackstone's day" (*id.* at 8), the only holding of this Court they cite (*id.* at 4, 8) applying the implied bias doctrine (*Crawford* v. *United States*, 212 U.S. 183 (1909), was later repudiated on precisely that point. *United States* v. *Wood*, 299 U.S. 123, 138-41 (1936); *see* Pet. 9, 15 n.7. For all respondents' talk about a constitutional "right" not to have the spouse of a party's employee sit on a jury (Br. in Opp. 1), they point to no constitutional text, no decision of this Court or any court (other than the Federal Circuit in this case) that created or endorsed such a "right."

I. CERTIORARI IS NECESSARY TO RESOLVE THE SPLIT OVER THE IMPLIED BIAS DOCTRINE

Respondents reiterate the flatly incorrect foundation for the Federal Circuit's decision: a Seventh Amendment right to exclude spouses of a party's employees from jury service. Br. in Opp. 1. Of course, these words cannot be found in the Constitution. And if such a right existed, then *all* courts—federal and state—would be bound to forbid

spouses of employees from serving on juries when the employer is a party. But that is not so. Numerous states reject respondents' purported constitutional right, and other federal circuits reject the implied bias argument accepted by the Federal Circuit here. *See* Pet. 11-17 & nn.3-9.

A. Respondents Mischaracterize this Court's Precedents on the Implied Bias Doctrine

There is no merit to respondents' suggestion (Br. in Opp. 4-5) that this Court endorses the implied bias doctrine. Courts of appeals have repeatedly articulated their understanding that this Court has not accepted the doctrine: "The Supreme Court has never explicitly adopted or rejected the doctrine of implied bias." *Tinsley* v. *Borg*, 895 F.2d 520, 527 (9th Cir. 1990); *see also Fitzgerald* v. *Greene*, 150 F.3d 357, 365 (4th Cir. 1998) (same); *Andrews* v. *Collins*, 21 F.3d 612, 620 (5th Cir. 1994) (same).

Among this Court's rulings, respondents' rely solely on *Crawford*, which held that federal employees were disqualified from serving on juries in federal government cases. *See* 212 U.S. at 194-96. But, this Court rejected *Crawford* in *Wood*. *See* Pet. 15 n.7; *cf. Baker* v. *Hudspeth*, 129 F.2d 779, 783 (10th Cir. 1942) (*Wood* overruled *Crawford*). Since *Wood*, this Court has "not looked favorably upon attempts to impute bias to jurors." *Andrews*, 21 F.3d at 620 (citing cases); *see also* Pet. 8-9 (same).

Contrary to respondents' effort to limit *Smith* v. *Phillips*, 455 U.S. 209 (1982) to its facts (Br. in Opp. 4), numerous courts hold that *Smith* rejected the implied bias doctrine entirely. *See* Pet. 11-12 & nn. 3-4. Although respondents try to elevate one Justice's concurrence to a holding endorsing the doctrine (Br. in Opp. 4-5), the Court's opinion in *Smith* was joined by five other Justices, who

constitute a majority. 455 U.S. at 210 (Rehnquist, J., joined by Burger, C.J., White, Blackmun, and Powell, J.J.).[1]

Other courts recognize that *Smith* dealt a serious blow to the implied bias doctrine. *See* Pet. 11-12 (citing cases). Just weeks after the petition in this case was filed, the Fourth Circuit reiterated its doubts regarding the doctrine. *See Conner* v. *Polk*, -- F.3d --, 2005 WL 1020953, at *7 n.4 (4th Cir. May 3, 2005) ("[t]here may be some question as to whether implied bias remains a viable doctrine following the Supreme Court's majority opinion in *Smith*"). Such continued uncertainty warrants certiorari, as these pervasive doubts will not be dispelled without this Court's direction.

B. The Circuits are Split

Respondents' argument (Br. in Opp. 5-6) that no circuit split exists over the implied bias doctrine is untenable.

Eighth Circuit. Respondents' dismissive minimizing of the Eighth Circuit's consistent holdings as mere "broad language" (*id.* at 5), would come as shocking news to both the circuit and district judges in the Eighth Circuit who repeatedly reject the implied bias doctrine.[2]

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[1] Concurring opinions cannot "take precedence over an opinion joined in its entirety by five Members of the Court." *County of Allegheny* v. *ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J. concurring in the judgment in part and dissenting in part).

[2] *See* Pet. 11 (citing cases); *Goeders* v. *Hundley*, 59 F.3d 73, 75-76 (8th Cir. 1995) (challenged juror had been married to the murder victim's niece; "In *Phillips*, the Supreme Court . . . rejected implied bias in cases of alleged juror bias"); *Irons v. Lockhart*, 741 F.2d 207, 208 (8th Cir. 1984) (under *Phillips*, "a court cannot impute [jury] bias based on the petitioner's bare allegations"); *United States* v. *Kelton*, 518 F.2d 531, 533 (8th Cir. 1975) (per curiam) (district court "correctly stated that this circuit has rejected

In response to these clear Eighth Circuit holdings, respondents offer (Br. in Opp. 5-6) a few stray cases—none of which upheld a claim of juror bias. Those cases simply recite dicta from other circuits that accept limited versions of the implied bias doctrine. *See United States* v. *Tucker*, 243 F.3d 499, 509 (8th Cir. 2001) (citing *United States* v. *Greer*, 223 F.3d 41, 53 (2d Cir. 2000)); *Fuller* v. *Bowersox*, 202 F.3d 1053, 1057 (8th Cir. 2000) (citing *Burton* v. *Johnson*, 948 F.2d 1150, 1158 n.10 (10th Cir. 1991)). In rejecting the bias challenges, neither *Tucker*, *Fuller*, nor *United States* v. *Parmley*, 108 F.3d 922 (8th Cir. 1997) held that the implied bias doctrine was viable, or that the Eighth Circuit's earlier

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'the *per se* theory of implied bias' in favor of a requirement that actual prejudice be demonstrated"); *United States* v. *Jones*, 486 F.2d 476, 477 (8th Cir. 1973) ("We have heretofore rejected the *per se* theory of implied bias advanced by [challenging party]"); *United States* v. *Williams*, 484 F.2d 176, 178 (8th Cir. 1973) ("At the most the challenge must rest entirely on a *per se* theory of implied bias. This Court reject[s challenger's] argument"); *accord Dyas* v. *Lockhart*, 705 F.2d 993, 997 (8th Cir. 1983) (no bias where trial judge was related to prosecuting attorneys); *Walters* v. *Maschner*, 151 F. Supp.2d 1068, 1090 (N.D. Iowa 2001) ("In *Phillips*, the Supreme Court . . . rejected implied bias in cases of alleged juror bias"); *United States* v. *Tucker*, 36 F. Supp.2d 1110, 1116 (E.D. Ark. 1999) ("The Court cannot imply or presume a juror's bias"), *aff'd*, 243 F.3d 499 (8th Cir. 2001); *United States ex rel. Means* v. *Solem*, 457 F. Supp. 1256, 1265 (D.S.D. 1978) ("The Eighth Circuit . . . stated 'this circuit has rejected the *per se* theory of implied bias in favor of a requirement that actual prejudice be demonstrated'") (quotation omitted); *Jamestown Farmers Elevator, Inc.*, v. *General Mills, Inc.*, 413 F. Supp. 764, 775 (D. N.D. 1976) ("The Eighth Circuit has recently rejected 'the *per se* theory of implied bias in favor of a requirement that actual prejudice be demonstrated'") (quotation omitted), *aff'd in part, rev'd in part on other grounds*, 552 F.2d 1285 (8th Cir. 1977).

precedents were questioned.[3]

Ninth Circuit. While recognizing the implied bias doctrine in some circumstances, the Ninth Circuit has held—consistent with this Court's precedents—that the doctrine is inapplicable to employees of a party. *See Nathan* v. *Boeing Co.*, 116 F.3d 422, 425 (9th Cir. 1997). If employees of parties are not *per se* excluded from serving on juries, then relatives of employees surely are not. Accordingly, had the instant case arisen in the Ninth Circuit, the jury's verdict would plainly have been upheld under *Nathan.*

Respondents cannot distinguish *Nathan.* Rather, they suggest that *Nathan* is no longer good law in light of *Dyer* v. *Calderon,* 151 F.3d 970 (9th Cir. 1998) (en banc), because the writing judge in *Nathan* also wrote the panel opinion in *Dyer.* Br. in Opp. 8 n.2. *Dyer* involved a juror who lied during voir dire about having relatives victimized by violent crime. 151 F.3d at 972-73. *Dyer* does not mention employment-based bias, and makes no mention of *Nathan,* much less criticize or overrule it.[4]

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[3] Respondents take entirely out of context the citation to *Parmley* in Caterpillar's rehearing petition in the Federal Circuit. Br. in Opp. 6. The citation addressed the Federal Circuit's inaccurate discussion of *Zamora* v. *Guam,* 394 F.2d 815 (9th Cir. 1968). Since the Federal Circuit incorrectly distinguished *Zamora* as involving allegations of "actual" bias rather than "implied" bias (*see* Pet. 22a-23a), Caterpillar's rehearing petition cited several cases—including *Parmley*—that correctly characterized the bias alleged in *Zamora* as "implied" rather than "actual." *See* Pet. for Reh'g at 13 n.10. Caterpillar never asserted that *Parmley* recognized the *viability* of the implied bias doctrine, as the Eighth Circuit has consistently rejected the doctrine (and rejected the bias challenge in *Parmley* as well).

[4] *See Kohler v. Nationwide Mut. Ins. Co.*, 1998 U.S. App. LEXIS 13619, at *2 (9th Cir. June 22, 1998) (following *Nathan* in

Other circuits. Additional circuits reject *per se* rules disqualifying jurors because of family relationships. Pet. 15-16 (citing cases from the Second, Fourth, Sixth, Seventh, and D.C. Circuits); *see also Orme* v. *Pratt,* 18 F. Cas. 820 (C.C.D.C. 1830) (Cranch, C.J.) (denying motion for new trial when a juror was the plaintiff's brother-in-law). The only case respondents cite (Br. in Opp. 6) involving family relationships was an Eleventh Circuit case holding that the juror in question (the cousin of a witness) could properly serve on the jury. *See United States* v. *Rhodes,* 177 F.3d 963, 965-66 (11th Cir. 1999).

Despite respondent's contrary view (Br. in Opp. 8), Caterpillar *did* cite a "case holding that the spouse of an employee should be treated differently from an employee for purposes of implied bias." *See* Pet. 13 n.5 (citing *Jackson* v. *Board of Mayor & Aldermen,* 111 So. 828 (Miss. 1927)). *Jackson* stated that the passages from Blackstone cited by respondents are inapplicable when the juror is a relative of an employee of a party/corporation. 111 So. at 828. This, coupled with the cases holding relatives of parties and employees of parties are not *per se* excluded (Pet. 13-17 & nn. 5-9), fully refutes respondents' point.

The only case respondents cite for their contention that spouses of a party's employees are automatically excluded is *Getter* v. *Wal-Mart Stores, Inc.,* 66 F.3d 1119, 1122 (10th Cir. 1995). But, the spouse in *Getter* was also a stockholder of the company. *See id.*; *contra Jamestown Farmers,* 413 F. Supp. at 775 (employees/stockholders are not per se disqualified). Here, there is no indication that Juror No. 3 was a Caterpillar stockholder.

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rejecting implied bias challenge); *Bainlardi* v. *SBC Warburg,* 1998 U.S. Dist. LEXIS 19512, at *10 (S.D.N.Y. Dec. 11, 1998) (same).

The Federal Circuit's holding that one's status as a spouse of a party's employee establishes a *per se* constitutional disqualification from jury service is ill-considered, inconsistent with other courts of appeals, and should be reviewed by this Court.

II. THE FEDERAL CIRCUIT'S EXPANSION OF *MARTINEZ-SALAZAR* REWARDS UNFAIR GAMESMANSHIP

Contrary to respondents' contention, this petition does not ask the Court to reconsider the holding in *United States* v. *Martinez-Salazar*, 528 U.S. 304 (2000). Rather, it seeks review of the Federal Circuit's unwarranted expansion of that case to reward a contrived claim of juror bias. The decision below expands *Martinez-Salazar* (which was decided under Fed. R. Crim. P. 24) by applying it in a civil case. *Cf. Cruz* v. *Jordan*, 357 F.3d 269, 271 (2d Cir. 2004) (doubting whether *Martinez-Salazar* is applicable to civil cases); *Ramstad* v. *Lear Seigler Diversified Holdings Corp.*, 836 F. Supp. 1511, 1515 (D. Minn. 1993) (civil case; party waived challenge to allegedly biased juror when party did not exercise peremptory challenges against juror).

Moreover, as Justice Scalia (joined by Justice Kennedy) stated, this Court was not confronted in *Martinez-Salazar* with a litigant who had the opportunity to strike an allegedly biased juror, but did not do so. *See* 528 U.S. at 318 (Scalia, J., concurring in the judgment) ("Since he *did* expend the [peremptory] challenge, that issue is simply not before us"). Justice Scalia strongly indicated that when a party forgoes the opportunity to strike a challenged juror, it is "far from certain" that *Martinez-Salazar* suggests the correct result. *See id.* at 318-19.

The wholly pretextual nature of respondents' implied bias claim exemplifies precisely the gamesmanship about which Justice Scalia cautioned. In addition to the post-

Martinez-Salazar cases cited in the petition (at 22-23), additional courts had previously recognized the clear potential for abuse, and rejected the tactics respondents employed below.[5]

Subsequent to the filing of the petition, the Seventh Circuit rejected precisely the *Martinez-Salazar*-type argument respondents offer here to justify their tactical decision not to peremptorily challenge a juror whose mere presence—respondents later claimed—tainted the verdict with constitutional infirmity. In *Anderson* v. *Griffin*, 397 F.3d 515, 517-18 (7th Cir. 2005) (Posner, J.) the plaintiff (an African-American) argued that two potential jurors with short hair could be "skinheads" who might be biased against him. *Id.* After the judge refused to ask the potential jurors if they were racists, plaintiff peremptorily struck one of the potential jurors, but passed on the other. *Id.*

The Seventh Circuit rejected plaintiff's argument that the judge erred. *Id.* The court noted that plaintiff still had a peremptory challenge remaining, yet allowed the second

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[5] *See, e.g., Ramstad*, 836 F. Supp. at 1515 ("Plaintiffs elected not to use their third peremptory challenge to strike Mr. Horst. . . . [T]hey cannot object to Mr. Horst sitting on the jury"); *Catando* v. *Sheraton Poste Inn*, 592 A.2d 294, 300 (N.J. App. 1991) ("if a challenge for cause is erroneously denied but the party does not use an available peremptory challenge to excuse the juror, the error is harmless"); *Lundstrom* v. *Brekke Enters.*, 765 P.2d 667, 674 (Idaho 1988) (party could have kept allegedly biased juror off panel by exercising peremptory challenge); *Commonwealth* v. *Rundle*, 192 A.2d 362, 364 (Pa. 1963) (defendant had only exercised two of twenty peremptory challenges when he passed over challenged juror); *Rich* v. *Campbell*, 2 P.2d 886, 887 (Wash. 1931) (party failed to strike allegedly biased juror); *Scragg* v. *Sallee*, 140 P. 706, 708 (Cal. App. 1914) (same); *Kelly* v. *Chicago, R. I. & P. R. Co.*, 175 Ill. App. 196, 213 (1912) (same).

juror to be seated. *Id.* at 518. As to plaintiff's argument that he had to use the remaining peremptories against potentially unfriendly jurors, the Seventh Circuit held that it would not extricate plaintiff from a "pickle" of his own making. *See id.* at 519. Respondents here make just the argument rejected by the Seventh Circuit. *See* Br. in Opp 3 (although three peremptories remained, respondents did not strike Juror No. 3 "because they wanted to ensure that certain other prospective jurors were not seated").

In short, the decision below rewards gamesmanship that other circuits rightfully condemn. It fully warrants this Court's review and reversal. Respondents' remaining reasons for opposing certiorari merit only brief response.

1. Respondents incorrectly suggest (Br. in Opp. 7) that certiorari is inappropriate because the Federal Circuit's published opinion is "not binding" on any court (supposedly because regional circuit law applied). Wholly aside from the incorrect, preposterous—and pernicious—notion of a non-binding published opinion, this Court has made clear that an opinion's "lack of precedential effect" "carries no weight in our decision to review the case." *C.I.R.* v. *McCoy,* 484 U.S. 3, 7 (1987). This Court has granted certiorari on numerous occasions to resolve circuit splits even when the underlying decision is unpublished. *See, e.g., E. Associated Coal Corp.* v. *U.M.W., Dist. 17,* 531 U.S. 57 (2000); *Old Chief* v. *United States,* 519 U.S. 172 (1997).

2. Despite respondents' denial that they acquiesced in Juror No. 3's service (Br. in Opp. 8 n.1), both the district court and the courts of appeals correctly so found.[6]

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[6] *See* Pet. 6. The district court held "the Sturmans were aware of Juror No. 3's marriage to a Caterpillar employee, yet declined to individually challenge her for cause when offered the opportunity by the Court to do so." Pet. App. 47a. The court of appeals added: "Sturman specifically stated it would not individually challenge

3. There is no merit to respondents' diversionary argument of waiver. Br. in Opp. 7, 12. The issues of implied bias and waiver of the challenge to Juror No. 3 were presented to and decided by the district court and the Federal Circuit. *See* 14a-27a, 46a-47a, 180a-181a. Even if respondents were correct that Caterpillar is making "new arguments," this Court has made clear that there is no waiver in such circumstances. *See, e.g., Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("traditional rule" of Court is that so long as issue or claim is preserved, petitioner can make any arguments supporting its position).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Juror No. 3, despite having additional reasons for doing so." *Id.* at 21a. There is no dispute that respondents possessed three peremptory challenges when they passed on Juror No. 3. Pet. 5.